No. 16-2036

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Respondent-Appellee,

v.

RALEIGH RESTAURANT CONCEPTS, INC., d/b/a THE MEN'S CLUB OF RALEIGH,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA (WESTERN DIVISION)

APPENDIX

Edward M. Cherof
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COUNSEL FOR RESPONDENT-APPELLEE

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2016, I caused to be served a true and correct copy of the within **APPENDIX** via the Court's electronic case filing system which will automatically serve the following counsel of record:

Michael P. Ellement
National Labor Relations Board
1015 Half St., SE
Washington, DC 20570

I hereby certify that on October 19, 2016, I caused to be served a true and correct copy of the within **APPENDIX** via U.S. Mail with sufficient postage thereon to reach its destination to the following counsel of record:

Ashley L. Banks
Lisa R. Shearin
National Labor Relations Board
4035 University Parkway, Suite 200
Winston-Salem, NC 27106

By: */s/ Edward M. Cherof*
Edward M. Cherof
Georgia Bar No. 123390

ATTORNEY FOR PETITIONER-APPELLANT

APPEAL,CLOSED,USMJ Numbers

U.S. District Court
EASTERN DISTRICT OF NORTH CAROLINA (Western Division)
CIVIL DOCKET FOR CASE #: 5:15-cv-00438-D

National Labor Relations Board v. Raleigh Restaurant Concepts, Inc.
Assigned to: Chief Judge James C. Dever, III
Case in other court: 4th Circuit Court of Appeals, 16-02036
Cause: 28:1331 Enforcement of Administrative Subpoena

Date Filed: 08/31/2015
Date Terminated: 08/12/2016
Jury Demand: None
Nature of Suit: 790 Labor: Other
Jurisdiction: U.S. Government Plaintiff

Petitioner

National Labor Relations Board

represented by **Ashley L. Banks**
National Labor Relations Board - Region 11
P. O. Box 11467
4035 University Parkway, Suite 200 (Zip 27106)
Winston-Salem, NC 27116-1467
336-631-5244
Fax: 336-631-5210
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ATTORNEY TO BE NOTICED

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Respondent

Raleigh Restaurant Concepts, Inc.
doing business as
The Men's Club Of Raleigh

represented by **Allan S. Rubin**
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2000 Town Center, Suite 1650
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Email: Patricia.Holland@jacksonlewis.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/31/2015	1	PETITION for Application for Order Enforcing Subpoena Duces Tecum filed by Petitioner National Labor Relations Board. (Attachments: # 1 Exhibit A-Copy of charge, # 2 Exhibit B-Copy of amended charge, # 3 Exhibit C-Copy of subpoena, # 4 Exhibit D-Copy of return post office receipt, # 5 Exhibit E-Copy of Region's Order, # 6 Exhibit F-Copy of Board's Order) (Shearin, Lisa) Modified on 9/16/2015 to identify exhibits (Felder, J). (Entered: 08/31/2015)
08/31/2015	2	Memorandum in Support regarding 1 Petition, filed by National Labor Relations Board. (Attachments: # 1 Exhibit 1-Copies of Decisions in Cases Cited) (Shearin, Lisa) Modified on 9/16/2015 to identify Exhibit 1.(Felder, J). (Entered: 08/31/2015)
08/31/2015	3	Proposed Order regarding 1 Petition, by National Labor Relations Board. (Shearin, Lisa) (Entered: 08/31/2015)
08/31/2015	4	Proposed Order regarding 1 Petition, *Order to Show Cause* by National Labor Relations Board. (Shearin, Lisa) (Entered: 08/31/2015)
08/31/2015	5	CERTIFICATE OF SERVICE by National Labor Relations Board regarding 4 Response, 3 Response, 1 Petition, 2 Memorandum in Support (Shearin, Lisa) (Entered: 08/31/2015)
09/16/2015		NOTICE TO COUNSEL - All counsel should file a Notice of Appearance pursuant to Local Civil Rule 5.2(a). Additionally, counsel is reminded that all future filings must conform to this court's policies which require reflection of the case number on all documents filed in this action. (Felder, J) (Entered: 09/16/2015)
09/16/2015	6	Notice of Appearance filed by Ashley L. Banks on behalf of National Labor Relations Board. (Banks, Ashley) (Entered: 09/16/2015)
09/18/2015	7	Notice of Appearance filed by Patricia L. Holland on behalf of Raleigh Restaurant Concepts, Inc.. (Holland, Patricia) (Entered: 09/18/2015)
09/18/2015	8	Notice of Appearance for non-district by Allan S. Rubin on behalf of Raleigh Restaurant Concepts, Inc.. (Rubin, Allan) (Entered: 09/18/2015)
10/02/2015		Motion Submitted to Chief Judge James C. Dever III: regarding 1 PETITION for Application for Order Enforcing Subpoena Duces Tecum filed by Petitioner National Labor Relations Board. (Jenkins, C.) (Entered: 10/02/2015)
10/06/2015	9	Consent MOTION for Extension of Time to File Response/Reply as to 1 MOTION filed by Raleigh Restaurant Concepts, Inc.. (Attachments: # 1 Text of Proposed Order) (Holland, Patricia) (Entered: 10/06/2015)
10/07/2015		Motion submitted to Chief Judge James C. Dever III: regarding 9 Consent MOTION for Extension of Time to File Response to 1 PETITION for Application for Order Enforcing Subpoena Duces Tecum. (Downing, L.) (Entered: 10/07/2015)
10/08/2015	10	ORDER granting 9 Motion for Extension of Time to File Response/Reply. Respondent shall have up to and including October 20, 2015, within which to file its Response. Signed by Chief Judge James C. Dever III on 10/8/2015. (Jenkins, C.) (Entered: 10/08/2015)
10/16/2015	11	Notice of Appearance for non-district by Edward M. Cherof on behalf of Raleigh Restaurant Concepts, Inc.. (Cherof, Edward) (Entered: 10/16/2015)
10/20/2015	12	Memorandum in Opposition regarding 1 MOTION *Application for Order Enforcing Subpoena Duces Tecum* filed by Raleigh Restaurant Concepts, Inc.. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1 - Complaint, # 3 Exhibit 2 - Position Statement, # 4 Exhibit 3 - Entertainment Lease, # 5 Exhibit 4 - Motion to Dismiss or to Compel Arbitration, # 6 Exhibit 5 - Order, # 7 Exhibit 6 - NLRB Charge, # 8 Exhibit 7 NLRB Amended Charge, # 9 Exhibit NLRB Subpoena, # 10 Exhibit 9 - Respondent's Petition to Revoke, in Part, Subpoena Duces Tecum, # 11 Exhibit 10 - Board Order, # 12 Exhibit 11 - Motion to Hold in Abeyance) (Cherof, Edward) (Entered: 10/20/2015)
10/20/2015	13	Certificate of Service filed by Raleigh Restaurant Concepts, Inc. regarding 12 Memorandum in Opposition,, *Amended.* (Cherof, Edward) (Entered: 10/20/2015)

10/23/2015		Notice to Counsel for the defendant: Pursuant to 7.1 of the Federal Rules of Civil Procedure and Local Civil Rule 7.3, all parties shall file a financial disclosure statement. A negative statement is required if a party has no disclosures to make. The disclosure statement must be on a form provided by the clerk. This form is available at the clerk's office and on the court's website. (Jenkins, C.) (Entered: 10/23/2015)
10/26/2015	14	Financial Disclosure Statement by Raleigh Restaurant Concepts, Inc. identifying Corporate Parent Family Dog,LLC, Corporate Parent VCG Holding Corporation for Raleigh Restaurant Concepts, Inc... (Holland, Patricia) (Entered: 10/26/2015)
10/28/2015	15	Financial Disclosure Statement by National Labor Relations Board. (Banks, Ashley) (Entered: 10/28/2015)
10/28/2015		NOTICE OF DEFICIENCY regarding 15 Financial Disclosure Statement - Counsel failed to attach a certificate of service pursuant to Fed. R. Civ. P. 5(d) and Section F(3) of the Court's CM/ECF Electronic Policies and Procedures Manual. Counsel should file a separately captioned certificate of service using the appropriate event located under the 'Civil Events - Service of Process' category. (Tripp, S.) (Entered: 10/28/2015)
10/28/2015	16	Certificate of Service filed by National Labor Relations Board regarding 15 Financial Disclosure Statement . (Banks, Ashley) (Entered: 10/28/2015)
11/17/2015		Remark: 12 Memorandum in Opposition regarding 1 MOTION Application for Order Enforcing Subpoena Duces Tecum submitted to Chief Judge Dever. (Jenkins, C.) (Entered: 11/17/2015)
12/21/2015	17	ORDER regarding 1 PETITION for Application for Order Enforcing Subpoena Duces Tecum. The court ORDERS each party to file a supplemental brief regarding what effect, if any, the Fifth Circuit opinion has on this case by January 8, 2016. Each brief shall not exceed ten pages. Counsel should read order in its entirety for additional information. Signed by Chief Judge James C. Dever III on 12/21/2015. (Jenkins, C.) (Entered: 12/21/2015)
01/08/2016	18	RESPONSE in Opposition regarding 1 MOTION *Supplemental Brief* filed by Raleigh Restaurant Concepts, Inc.. (Cherof, Edward) (Entered: 01/08/2016)
01/08/2016	19	Notice filed by Raleigh Restaurant Concepts, Inc. regarding 18 Response in Opposition to Motion *Attachment 1 - Murphy Oil v. NLRB*. (Cherof, Edward) (Entered: 01/08/2016)
01/08/2016	20	RESPONSE in Support regarding 1 MOTION *Supplemental Brief* filed by National Labor Relations Board. (Attachments: # 1 Exhibit Case Law 1, # 2 Exhibit Case Law 2, # 3 Exhibit Case Law 3) (Banks, Ashley) (Entered: 01/08/2016)
01/12/2016		Remark: 18 RESPONSE in Opposition, 19 Notice, and 20 RESPONSE in Support submitted to Chief Judge James C. Dever III. (Jenkins, C.) (Entered: 01/12/2016)
06/10/2016	21	Memorandum in Support *of Application for Order Enforcing Subpoena Duces Tecum* filed by National Labor Relations Board. (Attachments: # 1 Exhibit Referenced Case Law) (Banks, Ashley) (Entered: 06/10/2016)
06/14/2016		Remark: Supplemental Memo 21 submitted to Chief Judge Dever. (Briggeman, N.) (Entered: 06/14/2016)
06/20/2016	22	RESPONSE regarding 21 Memorandum in Support filed by Raleigh Restaurant Concepts, Inc.. (Attachments: # 1 Exhibit A - Cellular Sales of Missouri, LLC v. NLRB, # 2 Exhibit B - Marcus Group, LLC v. NLRB) (Cherof, Edward) (Entered: 06/20/2016)
08/12/2016	23	ORDER granting 1 Petition for Enforcmenet of Subpoena. Signed by Chief Judge James C. Dever III on 8/11/2016. (Briggeman, N.) (Entered: 08/12/2016)
09/08/2016	24	Notice of Appeal filed by Raleigh Restaurant Concepts, Inc. as to 23 Order on Motion for Miscellaneous Relief. Filing fee, receipt number 0417-3820645. (Holland, Patricia) (Entered: 09/08/2016)
09/08/2016	25	MOTION to Stay *Enforcement of Order* filed by Raleigh Restaurant Concepts, Inc.. (Attachments: # 1 Text of Proposed Order) (Cherof, Edward) (Entered: 09/08/2016)
09/08/2016	26	Memorandum in Support regarding 25 MOTION to Stay *Enforcement of Order* filed by Raleigh Restaurant Concepts, Inc.. (Attachments: # 1 Attachment 1 - Lewis v. Epic Systems Corp, # 2 Attachment 2 - U.S. v. B & D Vending, # 3 Attachment 3 - Patterson v. Raymours Furniture Co, # 4 Attachment 4 - Knight v. Rent-A-Center East, # 5 Attachment 5 - Coastal Sunbelt Produce v. NRLB) (Cherof, Edward) (Entered: 09/08/2016)
09/08/2016	27	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals regarding 24 Notice of Appeal. (Tripp, S.) (Entered: 09/08/2016)
09/09/2016	28	US Court of Appeals Case Number 16-2036 (T. Fischer, Case Manager) as to 24 Notice of Appeal filed by Raleigh Restaurant Concepts, Inc. (Tripp, S.) (Entered: 09/09/2016)
09/16/2016	29	Notice of Appearance for non-district by Michael P. Ellement on behalf of National Labor Relations Board. (Ellement, Michael) (Entered: 09/16/2016)
09/20/2016	30	Notice of Appearance filed by Michael P. Ellement on behalf of National Labor Relations Board. (Ellement, Michael) (Entered: 09/20/2016)
09/27/2016	31	RESPONSE in Opposition regarding 25 MOTION to Stay *Enforcement of Order* filed by National Labor Relations Board. (Attachments: # 1 Exhibit Patterson Case, # 2 Exhibit Technocrest Decision, # 3 Exhibit Technocrest Brief) (Ellement, Michael)

		(Entered: 09/27/2016)

PACER Service Center			
Transaction Receipt			
10/17/2016 11:45:50			
PACER Login:	jl0094:2572603:3938018	Client Code:	99999
Description:	Docket Report	Search Criteria:	5:15-cv-00438-D
Billable Pages:	4	Cost:	0.40

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

NATIONAL LABOR RELATIONS BOARD

Applicant

v.

RALEIGH RESTAURANT CONCEPTS, INC.
d/b/a THE MEN'S CLUB OF RALEIGH

Respondent

APPLICATION FOR ORDER ENFORCING SUBPOENA DUCES TECUM

The National Labor Relations Board, herein called the Board, an administrative agency of the Federal Government, applies to this Court for an order compelling compliance with a subpoena duces tecum that the Board issued and served on Respondent Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh. This application is made under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application the Board states as follows:

a. This Court has jurisdiction of the subject matter of the proceeding and of Respondent by virtue of Section 11(2) of the Act (29 U.S.C. 161(2)). The subpoena was issued to the Custodian of Records of Respondent and Respondent is a domestic corporation chartered under the laws of the United States and licensed to do business in the State of North Carolina, with an office at 3210 Yonkers Road, Raleigh, NC 27604. Respondent is engaged in business in this district.

b. The Board has issued Rules and Regulations, herein called the Rules, governing the conduct of its operations. The Rules have been published in the Federal Register (24 F.R.

9095), as provided for in the Administrative Procedure Act (5 U.S.C. §552). This Court may take judicial notice of the Rules by virtue of 44 U.S.C. 1507.

c. This application arises during the investigation of an unfair labor practice charge currently pending before the Board pursuant to Section 10(b) of the Act. Charging Party Leslie Holden, by her attorney Beatriz Sosa-Morris of Kennedy Hodges LLP, filed and amended the unfair labor practice charge in Case 10-CA-145882. The charge alleges that Respondent Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh violated Section 8(a)(1) of the Act by maintaining policies including a Mandatory Arbitration provision and Class and Collective Action Waiver and by seeking to enforce a waiver of the right to mediate and arbitrate employment and Fair Labor Standards Act (FLSA) disputes on a collective basis and to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b) against employees. Copies of the charge and amended charge are attached as exhibits A and B, respectively. Charging Party Leslie Holden, by her attorney Beatriz Sosa-Morris of Kennedy Hodges LLP, prepared and filed the charge and amended charge, and the Region served them consistent with the requirements of Section 10(b) of the Act and of Sections 102.9, 102.10 and 102.14 of the Rules.

d. In connection with the investigation of the unfair labor practice charges, which Board Agents of Region 10, Subregion 11 (herein called the Region) are conducting, and before the Region decides the merits of the charges, the Board attempted to determine whether a subset of individuals working at the Respondent's facility are statutory employees, whether Respondent's Mandatory Arbitration provision and Class and Collective Action Waiver is currently maintained, and if so, to which classifications of employees the policy is applied. On March 13, 2015, the Region sent a letter to Respondent seeking

information relevant to the charge, including information about the status of individuals as employees, entertainer leases, and copies of all handbooks and work rules that apply to employees at Respondent's facility.

e. On April 6, 2015, after receiving a partial response to the Region's March 13 letter, the Region sent a second letter to Respondent seeking the information that had not been provided. On April 17, 2015, Respondent refused to provide the requested information.

f. On April 30, 2015, the Region issued the subpoena duces tecum to Respondent seeking information relevant to the issues in the charge. The subpoenas required Respondents' Custodian of Records to appear and provide the subpoenaed documents on May 11, 2015, or alternatively, to produce the requested documents by mail no later than May 11, 2015. A copy of the subpoena is attached as Exhibit C. The issuance of this subpoena is consistent with the requirements of Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations.

g. The Region served the subpoena on Respondent by addressing and sending it by certified mail to the Custodian of Records of Raleigh Restaurant Concepts, Inc., d/b/a The Men's Club of Raleigh, at the offices located at 3210 Yonkers Rd., Raleigh, NC 27604-3654. Respondent acknowledged receipt of the subpoena on May 5, 2015. Service and receipt complied with Section 11(4) of the Act and Section 102.113 of the Board's Rules and Regulations. 29 C.F.R. 102.113. A copy of the return post office receipt is attached as Exhibit D.

h. On May 7, 2015, Respondent filed Respondent's Petition To Revoke, In Part, Subpoena Duces Tecum Number: B-1-MBDR2V, in which it objected, both generally and specifically, to providing the information requested pursuant to the subpoena.

Respondent did not appear or produce documents on May 11, 2015. On May 22, 2015, the Region served Respondent with its Opposition to the Petition to Revoke, and referred the Petition to Revoke to the National Labor Relations Board. A copy of the Region's Order Referring the Petition to Revoke to the Board, including the Petition to Revoke and the Opposition to the Petition to Revoke, is attached as Exhibit E.

i. On July 20, 2015, the Board issued an order denying the petition to revoke subpoena duces tecum B-1-MBDR2V. A copy of the Board's Order is attached as Exhibit F. On August 17, 2015, Respondent confirmed that it would not comply with the Board's order.

j. The failure and refusal of Respondents to appear and provide documentary evidence in obedience to the subpoena, which is related to the matters under investigation in the proceedings before the Board, constitutes contumacious conduct and/or a refusal to obey the subpoenas within the meaning of Section 11(2) of the Act. Furthermore, Respondents' conduct is preventing the Board from carrying out its duties and functions under the Act.

k. In view of Respondents' contumacious conduct, the Board requests:

1. That an Order to Show Cause issue, directing Respondent to appear before this Court on a date specified in the Order, and to show cause why an Order should not issue requiring them to appear before a Board Agent in Board Case 10–CA–145882, such appearance to be on a date fixed by the Court, or at such date, time and place as the Board Agent may designate, and there and then to provide documents relevant to the matters under investigation in the proceedings before the Board;

2. After considering arguments in response to the Order to Show Cause, that this Court issue an Order requiring the Respondent to appear before a Board Agent, at a date, time and place to be fixed by the Court or at a date, time and place to be fixed by the

Board Agent, and for Respondents to provide documents and answer any and all questions relevant to the matters under investigation in the proceedings before the Board; and

3. That the Applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Signed at Winston-Salem, North Carolina this 31st day of August, 2015.

National Labor Relations Board By:
Richard F. Griffin, Jr., Esq. General Counsel

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Exhibit A

FORM EXEMPT UNDER 44 U S C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
10-CA-145882	2/6/15

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1 EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh

b. Tel No 919-250-9826
c. Cell No.
f. Fax No. 919-854-0044
g. e-Mail
patricia.holland@jacksonlewis.c
h. Number of workers employed
over 1,000

d. Address (Street, city, state, and ZIP code)
3210 Yonkers Road
Raleigh, NC 27604

e. Employer Representative
Jackson Lewis PC, Patricia Holland
1400 Crescent Green Ste. 215
Cary, NC 27518

i. Type of Establishment (factory, mine, wholesaler, etc.)
Entertainment Club

j. Identify principal product or service
Entertainment club with exotic dancers

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act

2 Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)
Since on or about August 12, 2014, the above-referenced Employer has sought to enforce a waiver of the right (1) to mediate/arbitrate employment/FLSA disputes on a collective basis; and (2) to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b), against Leslie Holden, in violation of the NLRB decisions D.R Horton, 357 NLRB No. 184 (January 2012), and Murphy Oil USA, Inc., 361 NLRB No. 72 (October 2014).

The Employer has sought to enforce a waiver of Ms. Holden's NLRA right to pursue collectively pursue litigation in all forums judicial and arbitral.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
Leslie Holden

4a. Address (Street and number, city, state, and ZIP code)
[redacted]
Marietta, GA 30067

4b. Tel. No 919-607-77742
4c. Cell No.
4d Fax No
4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6 DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief

By B. Sosa-Morris — Beatriz Sosa-Morris
(signature of representative or person making charge) (Print/Type name and title or office, if any)

Address 711 West Alabama St. Houston, TX 77006 — 2/5/2015 (date)

Tel No 713-523-0001
Office, if any, Cell No
Fax No 713-523-1116
e-Mail bsosamorris@kennedyhodges.cc

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U S C § 151 *et seq* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed Reg, 74942-43 (Dec 13, 2006) The NLRB will further explain these uses upon request Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes

Exhibit B

FORM EXEMPT UNDER 44 U.S.C.3512

INTERNET FORM NLRB-501 2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
10-CA-145882	

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Raleigh Restaurant Concepts, Inc. d/b/a The Men s Club of Raleigh

b. Tel. No. 919-250-9826

c. Cell No.

f. Fax No. 919-854-0044

g. e-Mail
patricia.holland@jacksonlewis

h. Number of workers employed
1000

d. Address *(Street, city, state, and ZIP code)*
3210 Yonkers Road
Raleigh, NC 27604

e. Employer Representative
Jackson Lewis P.C.
1400 Crescent Green Street, Suite 215
Cary, NC 27518

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Entertainment Club

j. Identify principal product or service
Entertainment club with exotic dancers

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 a), subsections 1) and *(list subsections)* of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Since on or about August 2014 and continuing to the present, the Employer has maintained policies including a Mandatory Arbitration provision and Class and Collective Action Waiver.
Since on or about August 12, 2014, the above-referenced Employer has sought to enforce a waiver of the right (1) to mediate/arbitrate employment/FLSA disputes on a collective basis; and (2) to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b), against Leslie Holden, in violation of the NLRB decisions D.R Horton, 357 NLRB No. 184 (January 2012), and Murphy Oil USA, Inc., 361 NLRB No. 72 (October 2014).The Employer has sought to enforce a waiver of Ms. Holden s NLRA right to pursue collectively pursue litigation in all forums judicial and arbitral.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Leslie Holden

4. Address *(Street and number, city, state, and ZIP code)*
[redacted]
Atlanta, GA 30313

4b. Tel. No. 919-607-7742

4c. Cell No.

4d. Fax No.

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By B. Sosa-Morris
(signature of representative or person making charge)

Beatriz Sosa-Morris
(Print/type name and title or office, if any)

Tel. No. 713-523-0001

Office, if any, Cell No.

Fax No. 713-523-1116

e-Mail
bsosamorris@kennedyhodges.c

Address 711 West Alabama St. Houston, TX 77006

04/29/2015
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 12, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit C

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records
Raleigh Restaurant Concepts, Inc.
d/b/a The Men's Club of Raleigh
3210 Yonkers Rd.
Raleigh, NC 27604-3654

As requested by ASHLEY L. BANKS, on behalf of the General Counsel

whose address is 4035 University Pkwy Ste 200, Winston Salem, NC 27106-3275
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE the Regional Director or his/her designee of the National Labor Relations Board

at 4035 University Pkwy Ste 200

in the City of Winston Salem, NC

on May 11, 2015 at 10:00 a.m. or any adjourned or rescheduled date to testify in Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh 10-CA-145882
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-MBDR2V

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Winston Salem, NC

Dated: 04-30-15

Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in Federal court.

ATTACHMENT

DEFINITIONS AND INSTRUCTIONS

a. **"Document"** means any existing printed, typewritten or otherwise recorded material of whatever character, records stored on computer or electronically, records kept on microfiche or written by hand or produced by hand and graphic material, including without limitation, checks, cancelled checks, computer hard drives, discs and/or files and all data contained therein, computer printouts, E-mail communications and records, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, licenses, files, letters, facsimile transmissions, memoranda, telegrams, minutes, notes, contracts, agreements, transcripts, diaries, appointment books, reports, records, payroll records, books, lists, logs, worksheets, ledgers, summaries of records of telephone conversations, summaries of records of personal conversations, interviews, meetings, accountants' or bookkeepers' work papers, records of meetings or conference reports, drafts, work papers, calendars, interoffice communications, financial statements, inventories, news reports, periodicals, press releases, graphs, charts, advertisements, statements, affidavits, photographs, negatives, slides, disks, reels, microfilm, audio or video tapes and any duplicate copies of any such material in the possession of, control of, or available to the subpoenaed party, or any agent, representative or other person acting in cooperation with, in concert with or on behalf of the subpoenaed party.

b. "Employer" means Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh.

c. "Employer's facility" means the facility located at 3210 Yonkers Road, Raleigh, North Carolina.

d. "Person" or "persons" means natural persons, corporations, limited liability companies, partnerships, sole proprietorships, associations, organizations, trusts, joint ventures, groups of natural persons or other organizations, or any other kind of entity.

e. "Period covered by this subpoena" means the period from July 1, 2014, through the present and the subpoena seeks only documents from that period unless another period is specified. This subpoena request is continuing in character and if additional responsive documents come to your attention after the date of production, such documents must be promptly produced.

f. Any copies of documents that are different in any way from the original, such as by interlineation, receipt stamp, notation, or indication of copies sent or received, are considered original documents and must be produced separately from the originals.

g. If any document covered by this subpoena contains codes or classifications, all documents explaining or defining the codes or classifications used in the document must also be produced.

h. Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

i. All documents produced pursuant to this subpoena should be presented as they are kept in the usual course of business or organized by the subpoena paragraph to which the document or set of documents is responsive.

j. This subpoena applies to documents in your possession, custody, or control.

k. If a claim of privilege is made as to any document which is the subject of this subpoena, a claim of privilege must be expressly made and you must describe the nature of the withheld document, communication, or tangible thing in a manner that, without revealing information itself privileged or protected, will enable an assessment of the claim to be made.

l. Unless otherwise stated, this subpoena does not supersede, revoke or cancel any other subpoena(s) previously issued in this proceeding.

DOCUMENTS TO BE PRODUCED

1. All entertainment leases signed by individuals who worked at the Employer's facility during the period covered by this subpoena.

2. To the extent that all versions of the entertainment leases identified in Request #1 are identical (except for the named individual who signed the lease), in lieu of providing copies of all leases signed by individuals, for the period covered by the subpoena, provide:

    a) a single copy of each version (if the provisions of the lease differ) of entertainment leases signed by individuals who worked at the Employer's facility; and

    b) a list of names for all individuals who signed the respective version of the entertainment lease, the date their lease was executed, and the duration period of their lease.

3. Documents, including employee handbooks and company guidelines, that show all work rules, policies, or other conditions of employment in effect for all individuals at Employer's facility, excluding supervisors and managerial employees, during the period covered by this subpoena, including documents showing any changes to the rules, the effective dates of any such changes, and a description or statement of the changes, that require:

    a) the mandatory arbitration of all controversies, claims, and/or disputes arising between the Employer and individuals who worked at the Employer's facility;

    b) that individuals waive their right to litigate, in a court of law, all controversies, claims, and/or disputes arising between the Employer and individuals who worked at the Employer's facility; and

    c) that individuals who worked at the Employer's facility waive their right to class and collective action for any and all controversies, claims, and/or disputes arising out of their work at the Employer's facility.

Exhibit E

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Region 10, Subregion 11
4035 University Pkwy Ste 200
Winston Salem, NC 27106-3275
Agency Website: www.nlrb.gov
Telephone: (336)631-5201
Fax: (336)631-5210

May 22, 2015

Mr. William B. Cowen, Solicitor
Office of the Solicitor
National Labor Relations Board
1099 14th St. NW
Washington DC 20570
Via electronic mail to: solicitor@nlrb.gov

Re: Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh
Case 10-CA-145882

Dear Solicitor Cowen:

Pursuant to OM 11-70, please find enclosed the following materials relative to Region 10, Subregion 11's investigative Subpoena Duces Tecum No. B-1-MBDR2V and the Employer's Petition to Revoke, in part, Subpoena Duces Tecum No. B-1-MBDR2V:

1. Regional Director's Order Referring the Employer's Petition to Revoke, in part, Subpoena Duces Tecum No. B-1-MBDR2V. (Petition to Revoke attached)

2. Opposition to the Petition to Revoke with attachments, including a copy of the Charge, the First Amended Charge, Investigative Subpoena Duces Tecum No. B-1-MBDR2V; and proof of service.

Thank you for your assistance in this matter.

Sincerely,

Claude T. Harrell, Jr.
Regional Director

cc: Edward M. Cherof, Esq.
cherofe@jacksonlewis.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

RALEIGH RESTAURANT CONCEPTS, INC.
D/B/A THE MEN'S CLUB OF RALEIGH

and **Case 10-CA-145882**

LESLIE HOLDEN, an Individual

ORDER REFERRING EMPLOYER'S PETITION TO REVOKE, IN PART, SUBPOENA DUCES TECUM NO. B-1-MBDR2V TO THE BOARD

On May 7, 2015, Counsel for the Employer filed with the Regional Director a Petition to Revoke, in part, Subpoena Duces Tecum No. B-1-MBDR2V.

IT IS ORDERED, pursuant to Section 102.31(b) of the Board's Rules and Regulations, that the Petition is hereby referred to the Board for ruling.

Dated: May 22, 2015

Claude T. Harrell Jr.
Regional Director
National Labor Relations Board
Region 10, by

Scott C. Thompson
Officer-In-Charge
National Labor Relations Board
Subregion 11
4035 University Pkwy Ste 200
Winston Salem, NC 27106-3275

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

RALEIGH RESTAURANT CONCEPTS, INC.
D/B/A THE MEN'S CLUB OF RALEIGH

and **Case 10-CA-145882**

LESLIE HOLDEN, an Individual

AFFIDAVIT OF SERVICE OF: Order Referring Petition to Revoke, in part, Subpoena Duces Tecum No. B-1-MBDR2V, dated May 22, 2015.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on May 22, 2015, I served the above-entitled document(s) by **regular mail and e-mail** upon the following:

Edward M. Cherof, Esq.
Jackson Lewis P.C.
1155 Peachtree St NE Ste 1000
Atlanta, GA 30309-3630
cherofe@jacksonlewis.com

May 22, 2015
Date

Scott C. Thompson, Designated Agent of NLRB
Name

/s/ Scott C. Thompson
Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 11

RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH

Case no. 10-CA-145882

RESPONDENT'S PETITION TO REVOKE, IN PART, SUBPOENA *DUCES TECUM* NUMBER: B-1-MBDR2V

Raleigh Restaurant Concepts, Inc. d/b/a/ The Men's Club of Raleigh ("Company" or "Respondent") pursuant to Section 102.31 (b) of the National Labor Relations Board Rules and Regulations, hereby petitions to revoke, in part, Subpoena *Duces Tecum* No. B-1-MBDR2V for the reasons set forth below.

INTRODUCTION

On April 30, 2015, Respondent was served with a Subpoena *Duces Tecum* No. B-1-MBDR2V (the "Subpoena"), attached hereto as Exhibit A. In the above-referenced Case ("Case") Charging Party's allegations are as follows:

> Since on or about August 2014 and continuing to the present, [Respondent] has maintained policies including a Mandatory Arbitration provision and Class and Collective Action Waiver. Since on or about August 12, 2014, the above-referenced [Respondent] has sought to enforce a waiver of the right (1) to mediate/arbitrate employment/FLSA disputes on a collective basis; and (2) to join a collective action pursuant to the FLSA. 29 U.S.C. 216(b), against Leslie Holden, in violation of the NLRB decisions D.R. Horton, 357 NLRB No. 184 (January 2012), and Murphy Oil USA, Inc., 361 NLRB No. 72 (October 2014). The [Respondent] has sought to enforce a waiver of Ms. Holden s NLRA right to pursue collectively pursue litigation in all forums judicial and arbitral.

Charge Case 10-CA-145882. The Subpoena contains three paragraphs requesting documents and /or other information. Based on the nature of the Charge, the facts relevant to the Charge, and applicable law, rules, and regulations, the Company hereby submits this Petition to Revoke the Subpoena.

GENERAL OBJECTIONS

1.

The Company offers general objections to producing any of the requested documents which are not relevant to the allegations raised in the Amended Charge. Documents sought by Subpoena *Duces Tecum* in an NLRB investigation must be relevant to an issue raised in the Charge. See NLRB Rules and Regulations, § 102.31(b); Dow Chemical Co. v. Allen, 672 F.2d 1262, 1268 (7th Cir. 1982) ("relevancy of an adjudicative subpoena is measured against the charges specified in the complaint") [citations omitted]; Federal Trade Commission v. Anderson, 631 F.2d 741, 746 (D.C. Cir. 1979). The party requesting the documents has the burden of establishing their relevancy. See National Labor Relations Board v. Pinkerton's, Inc., 621 F.2d 1322 (6th Cir. 1980); Pinkerton's Inc., 233 NLRB No. 39 (1977). To satisfy this burden, the requesting party must provide evidence supporting its claim of relevancy. If the requesting party fails to establish the relevancy of the information, the subpoena must be revoked. NLRB Rules and Regulations, § 102.31(b).

In addition, Section 102.31(b) of the Board's Rules and Regulations provides, in relevant part, that upon a petition to revoke, "[the] Administrative Law Judge or the Board, as the case may be, shall revoke the subpoena, if, in his opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the

subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid."

The Company offers general objections to producing any of the requested documents to the extent that the Region invoked its subpoena power for the improper purpose of "initiating or expanding charges or investigations." Allied Waste Services of Massachusetts, LLC and Max Alexander, Case 01-CA-123082. The Board has limited power to investigate a Charge. Id. ("Section 11(1) of the Act limits the Board's subpoena power to a particular 'matter under investigation or in question.'"). The Board cannot initiate its own unfair labor practice proceeding. Id. The Board cannot expand an ongoing unfair labor practice proceeding. Id. (The Board does not have "carte blanch to expand the charge as [it] might please, or to ignore it all together.") [citation omitted]. Congress intentionally limited the Board's investigatory powers. Id. Where the Board invokes its subpoena power to expand an ongoing investigation it does so for an "improper purpose." Id. ("[I]f the record revealed that the Region invoked our subpoena power to obtain employee handbooks or policy statements for the purpose of initiating or expanding charges or investigations, this would be an 'improper purpose' that would warrant the revocation of the subpoena.") [emphasis added].

2.

The Company offers general objections to producing any of the requested documents to the extent the Region seeks such documents for the purpose of investigating whether the enforcement of class action waivers are unlawful under Section 7 of the Act. The Supreme Court, as well as the Second, Fifth, Eighth, Ninth, and Eleventh Circuits have explicitly or implicitly rejected the Board's position that class action waivers violate the Act. See

American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013); CompuCredit v. Greenwood, 132 S. Ct. 665, 669 (2012); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014)) cert denied 134 S. Ct. 2886 (June 30, 2014); Richards v. Ernst & Young, LLP, 744 F. 3d 1072, 1075, n.3 (9th Cir. 2013)), cert. denied 135 S. Ct. 355 (2014); D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013) pet. for rehearing en banc denied (5th Cir. No. 12-60031, Apr. 16, 2014); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. Mo. 2013); Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980). In the absence of an express congressional command, the validity of a class action waiver is determined under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

SPECIFIC OBJECTIONS

1.

The entertainment leases referenced in Request No. 1 of the Subpoena are identical except for the named individuals who signed the lease. The Company will produce documents responsive to Request No. 2 a) of the Subpoena.

2.

The Company will produce documents responsive to Request No. 2 a) of the Subpoena.

3.

The Company objects to Request No. 2 b), which seeks a list of names for all individuals who signed the lease, the date each individuals lease was executed and the duration period of each lease, because such request seeks information that is not relevant to any issue raised in the Amended Charge. Neither the name of all individuals who signed the entertainment lease, the date on which such individuals executed the lease, nor the duration of that

entertainment lease is relevant to the determination of whether entertainers are employees or independent contractors. Similarly, neither the name of the individuals who signed the entertainment lease, the date on which such individuals executed the lease, nor the duration of that entertainment lease is relevant to the determination of whether the enforcement of a class action waiver contained within an entertainment lease violates Section 7 of the Act. The Company further objects to Request No. 2 b) to the extent that the Region seeks information for the purpose of investigating whether the enforcement of class action waivers are unlawful under Section 7 of the Act. The Company has already provided the entire entertainment lease which Charging Party and other entertainers sign, which includes the arbitration provision and class action waiver in full. Finally, some entertainers work for only a day, and for short periods of time. Thus, requiring the Company to provide a list of all entertainers over the applicable time period is overly burdensome.

4.

The Company objects to Request No. 3 to the extent that it seeks employee handbooks because such request seeks documents that are not relevant to any issue raised in the Amended Charge. The Company did not provide entertainers with a copy of the employee handbook. Entertainers are not employees. Employee handbooks that were never provided to entertainers are not relevant to the issue of whether entertainers are employees or independent contractors. Similarly, employee handbooks that were never provided to entertainers are not relevant to the issue of whether the enforcement of a class action waiver within an entertainment lease violates Section 7 of the Act. The Company further objects to Request No. 3 because it seeks documents for the improper purpose of expanding or initiating an investigation. The Company further objects to Request No. 3 to the extent that the Region seeks information for the

purpose of investigating whether the enforcement of class action waivers are unlawful under Section 7 of the Act. The Company further objects to Request No. 3 on the grounds that it does not describe with sufficient particularity the evidence of which is required. The Company has already provided the entire entertainment lease which Charging Party and other entertainers sign, which includes the arbitration provision, the litigation waiver and class action waiver in full.

For the forgoing reasons, the Company requests that Subpoena No. B-1-MBDR2V be revoked, in part, as requested herein.

Respectfully submitted,

JACKSON LEWIS, P.C.

By: EMC / JRC

Edward M. Cherof
1155 Peachtree Street
Suite 1000
Atlanta, Georgia 30309-3600
Tele: 404-525-8200
Facsimile: 404-525-1173
Email: CherofE@jacksonlewis.com

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2015, I caused the foregoing **RESPONDENT'S PETITION TO REVOKE, IN PART, SUBPOENA *DUCES TECUM* NUMBER: B-1-MBDR2V** to be filed with the Regional Director, National Labor Relations Board, Subregion 11, via electronic case filing at www.nlrb.gov.

I also certify that I caused a copy to be served via electronic mail and U.S. mail, postage-prepaid, upon the following:

Ashley L. Banks, Esq.
Field Attorney on behalf of
the General Counsel
National Labor Relations Board
4035 University Parkway
Suite 200
Winston Salem, NC 27106-3275
Email: Ashley.Banks@nlrb.gov

Ms. Leslie Holden
[redacted]
Atlanta, GA 30312

Todd R. Ellis, Esq.
Law Office of Todd Ellis, P.A.
7911 Broad River Road, Suite 100
Irmo, SC 29063
Email: todd@toddellislaw.com

David W. Hodges, Esq.
John A. Neuman,Esq.
Kennedy Hodges, L.L.P.
711 W. Alabama Street
Houston, TX 77006
Email: dhodges@kennedyhodges.com
Email: jneuman@kennedyhodges.com

EMC / JRC
Edward M. Cherof

EXHIBIT A

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

SUBREGION 11
4035 University Pkwy Ste 200
Winston Salem, NC 27106-3275

Agency Website: www.nlrb.gov
Telephone: (336)631-5201
Fax: (336)631-5210

Agent's Direct Dial: (336)631-5244

April 30, 2015

Edward M. Cherof, Esq.
Jackson Lewis P.C.
1155 Peachtree St NE Ste 1000
Atlanta, GA 30309-3630
VIA EMAIL ONLY: cherofe@jacksonlewis.com

Re: Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh
Case 10-CA-145882

Dear Mr. Cherof:

Enclosed is a courtesy copy of an investigative subpoena duces tecum that has been served on your client requiring production of certain items in connection with the investigation of Case 10-CA-145882. Please note that the subpoena paragraphs include requests for documents, including the production of emails. When you produce the subpoenaed items, please be prepared to provide the following information regarding production of the subpoenaed emails:

- **Whose email was searched?** I will expect a search of the email of all individuals ("custodians") who are most likely to possess communications covered by the subpoena.

- **What email was searched?** For each custodian's mailbox, what folders, archives and document management systems were searched? Did the search include both email stored on the Respondent's server for its company email system, and email stored in personal folders and archives on individual computers? Did the search include email hosted on third-party service providers such as Google or Yahoo, including both company and personal accounts used by custodians for work-related communications?

- **How was the search conducted?** Who conducted the searches, and what search software and/or search terms were used to locate emails?

For your convenience and in lieu of the enclosed subpoena duces tecum directing you to appear and to produce identified documents before the Regional Director of Region 10, Subregion 11 in our Winston Salem Regional office, you may produce the required documents by sending them to my attention via United States Postal Service, UPS, Fed-Ex or any other form of delivery to the above address for receipt no later than close of business on May 11, 2015.

Please contact me at (336)631-5244, or by e-mail, ashley.banks@nlrb.gov, if you have any questions about the subpoena. Thank you in advance for your cooperation.

Very truly yours,

/s/ Ashley L. Banks
Ashley L. Banks
Field Attorney

Enclosures

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records
Raleigh Restaurant Concepts, Inc.
d/b/a The Men's Club of Raleigh
3210 Yonkers Rd.
Raleigh, NC 27604-3654

As requested by ASHLEY L. BANKS, on behalf of the General Counsel

whose address is 4035 University Pkwy Ste 200, Winston Salem, NC 27106-3275
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE the Regional Director or his/her designee

of the National Labor Relations Board

at 4035 University Pkwy Ste 200

In the City of Winston Salem, NC

on May 11, 2015 at 10:00 a.m. or any adjourned

or rescheduled date to testify in Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh 10-CA-145882
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(a) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-MBDR2V

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Winston Salem, NC

Dated: 04-30-15

Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

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ATTACHMENT

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b. "Employer" means Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh.

c. "Employer's facility" means the facility located at 3210 Yonkers Road, Raleigh, North Carolina.

d. "Person" or "persons" means natural persons, corporations, limited liability companies, partnerships, sole proprietorships, associations, organizations, trusts, joint ventures, groups of natural persons or other organizations, or any other kind of entity.

e. "Period covered by this subpoena" means the period from July 1, 2014, through the present and the subpoena seeks only documents from that period unless another period is specified. This subpoena request is continuing in character and if additional responsive documents come to your attention after the date of production, such documents must be promptly produced.

f. Any copies of documents that are different in any way from the original, such as by interlineation, receipt stamp, notation, or indication of copies sent or received, are considered original documents and must be produced separately from the originals.

g. If any document covered by this subpoena contains codes or classifications, all documents explaining or defining the codes or classifications used in the document must also be produced.

h. Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

i. All documents produced pursuant to this subpoena should be presented as they are kept in the usual course of business or organized by the subpoena paragraph to which the document or set of documents is responsive.

j. This subpoena applies to documents in your possession, custody, or control.

k. If a claim of privilege is made as to any document which is the subject of this subpoena, a claim of privilege must be expressly made and you must describe the nature of the withheld document, communication, or tangible thing in a manner that, without revealing information itself privileged or protected, will enable an assessment of the claim to be made.

l. Unless otherwise stated, this subpoena does not supersede, revoke or cancel any other subpoena(s) previously issued in this proceeding.

DOCUMENTS TO BE PRODUCED

1. All entertainment leases signed by individuals who worked at the Employer's facility during the period covered by this subpoena.

2. To the extent that all versions of the entertainment leases identified in Request #1 are identical (except for the named individual who signed the lease), in lieu of providing copies of all leases signed by individuals, for the period covered by the subpoena, provide:

   a) a single copy of each version (if the provisions of the lease differ) of entertainment leases signed by individuals who worked at the Employer's facility; and

   b) a list of names for all individuals who signed the respective version of the entertainment lease, the date their lease was executed, and the duration period of their lease.

3. Documents, including employee handbooks and company guidelines, that show all work rules, policies, or other conditions of employment in effect for all individuals at Employer's facility, excluding supervisors and managerial employees, during the period covered by this subpoena, including documents showing any changes to the rules, the effective dates of any such changes, and a description or statement of the changes, that require:

   a) the mandatory arbitration of all controversies, claims, and/or disputes arising between the Employer and individuals who worked at the Employer's facility;

   b) that individuals waive their right to litigate, in a court of law, all controversies, claims, and/or disputes arising between the Employer and individuals who worked at the Employer's facility; and

   c) that individuals who worked at the Employer's facility waive their right to class and collective action for any and all controversies, claims, and/or disputes arising out of their work at the Employer's facility.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

RALEIGH RESTAURANT CONCEPTS, INC.
D/B/A THE MEN'S CLUB OF RALEIGH

And **Case 10-CA-145882**

LESLIE HOLDEN, an Individual

COUNSEL FOR GENERAL COUNSEL'S OPPOSITION TO EMPLOYER'S PETITION TO REVOKE, IN PART, SUBPOENA DUCES TECUM NO. B-1-MBDR2V

Comes now Counsel for General Counsel and herein files this Opposition to Employer's Petition to Revoke, in part, Subpoena Duces Tecum No. B-1-MBDR2V and opposes the petition on the following grounds:

1. On February 6, 2015, Leslie Holden (Charging Party) filed the underlying unfair labor practice charge alleging that, since on or about August 12, 2014, Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh (Employer) enforced a waiver of her right to collectively mediate and/or arbitrate her employment-related claims, specifically her claim for wages under the Fair Labor Standards Act (FLSA) and the North Carolina Wage and Hour Act (NCWHA), and her right to collectively pursue litigation in all forums judicial and arbitral, in violation of Section 8(a)(1) of the Act. On April 29, 2015, the charge was amended to further allege that, since August 2014, the Employer has maintained, as a condition of employment, a policy requiring the mandatory arbitration of all employment-related disputes and a waiver of

class and collective action, in violation of Section 8(a)(1) of the Act. A copy of the charge, amended charge, and the respective Affidavits of Service are attached as Exhibit A.

2. On April 30, 2015, the Subregion served on the Employer, by certified mail, investigative Subpoena Duces Tecum No. B-1-MBDR2V seeking documents related to the Subregion's investigation of the above-referenced charge. A copy of the Subpoena Duces Tecum is attached as Exhibit B.

3. On May 7, 2015, Counsel for the Employer filed a Petition to Revoke, in part, Subpoena Duces Tecum No. B-1-MBD2RV, challenging the production of certain documents responsive to the requests. The Employer asserts both "general" and "specific" objections to the requests. As detailed below, the Employer's objections lack merit, and the petition to partially revoke the subpoena should be denied.

4. The Employer asserts three general objections to the subpoena. First, the Employer objects to producing any documents that are not relevant to the charge. It is well-settled that Section 11(1) of the Act specifically authorizes the Board to issue investigatory subpoenas seeking testimony or documents. See *Offshore Mariners United,* 338 NLRB 745, 746 (2002). Section 102.31(b) of the Board's Rules and Regulations provides, in pertinent part, that the Board shall revoke a subpoena if the evidence sought does not relate to any matter under investigation, if the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for some other reason sufficient in law the subpoena is otherwise invalid.

Here, the Employer operates a gentlemen's club and restaurant in Raleigh, North Carolina, where it contracts with "female entertainers" to provide nude or semi-nude entertainment for patrons. The individual contracts between the entertainers and Employer –

entitled "Entertainment Lease" – have an "Arbitration/Waiver of Class and Collective Actions/Attorney Fees and Costs" provision that mandates the arbitration of all employment-related disputes and precludes class or collective action. Although the Employer's core defense is that the entertainers are not employees within the meaning of Section 2(3) of the Act, it admits that it employs other staff, such as bartenders, wait staff, bar backs and security personnel, all of whom are bound by policies set forth in an employee handbook. As the requests directly relate to the alleged unlawful policies – whether contained in an entertainer's lease or in the Employer's handbook – the requested documents are all relevant to the amended charge allegations.

Second, the Employer objects to producing any documents that it asserts would allow the Region to initiate or expand the charge and investigation. Again, the charge, filed by the Charging Party, alleges the unlawful maintenance and enforcement of policies that restrain and coerce employees in the exercise of their Section 7 rights. The requested documents all directly relate to the allegations in the charge. The Region is not seeking to expand the scope of the charge or investigation; to the contrary, it has an obligation to thoroughly investigate the allegations and ensure that the Employer is abiding by the tenets of the Act.

Finally, the Employer generally objects to producing documents that are necessary to investigate whether the enforcement of class action waivers is unlawful under Section 7 of the Act. In this regard, the Employer argues that the Supreme Court and several Circuit courts have explicitly or implicitly rejected the Board's position that class action waivers violate the Act. This argument fails for two reasons. First, the Supreme Court has not specifically considered whether these types of policies violate the Act. Second, in regard to the decisions from various Circuit courts, "[i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the

court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise." *Insurance Agents International Union*, 119 NLRB 768, 773 (1957). See also *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963); *Novak Logging Company*, 119 NLRB 1573 (1958). The Employer's reliance on non-binding precedent from other courts is, therefore, misplaced. Moreover, the cases relied upon by the Employer, with the exception of *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) *pet. for rehearing en banc denied* (5th Cir. No. 12-60031, Apr. 16, 2014), are not Board cases and do not address the issue of whether maintenance or enforcement of a mandatory arbitration provision and/or collective and class action waiver violates the Act. Notably, in *Murphy Oil, USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014), the Board recently reaffirmed *D.R. Horton*, stating that "[t]oday we affirm that decision [*D.R. Horton*]. Its reasoning and its result were correct, [. .] and no decision of the Supreme Court speaks directly to the issue we consider here." 361 NLRB slip op. at 2.

5. In addition to its general objections, the Employer specifically objects to providing documents responsive to Request Nos. 2 (b) and 3. At the outset, Request No. 1 in the subpoena seeks all signed entertainment leases between entertainers and the Employer during the period of July 1, 2014, to the present. In lieu of providing all of the leases, in Request No. 2, the Subregion requested that the Employer provide: a) a single copy of each version of the lease in effect during the requisite timeframe; and b) a list of names for all individuals who signed each version of the lease, the date their lease was executed and the duration period of their lease. Rather than provide the leases as requested in Request No. 1, the Employer simply referenced the leases signed by the Charging Party, which were provided in the underlying investigation, and confirmed that all other leases were the same version. Despite the Subregion's willingness to accept a list of pertinent information, in lieu of receiving all of the leases, the Employer failed to

produce the information sought in Request No. 2 (b) and objects on the grounds that the information sought is irrelevant and the request is burdensome.

The Employer's specific objections fail. The leases or, in lieu of the leases, the requested information contained in the leases are plainly relevant to the investigation of the charge allegations as they identify potential witnesses who can assist the Region with determining whether the entertainers are employees within the meaning of the Act and identify the class affected by the Employer's alleged maintenance and enforcement of such policies. Furthermore, this information is not privileged.

Likewise, the Employer's burdensomeness argument fails as it has not demonstrated that providing the leases or requested information disrupts its normal course of business. In this regard, the party seeking to avoid compliance with a subpoena bears the burden of establishing that it is unduly burdensome or oppressive. See *CNN America, Inc.*, 353 NLRB 891, 894 (2009). In order to satisfy that burden, it must show that production of the subpoenaed information "would seriously disrupt its normal business operations." *Id.* citing *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996), quoting *EEOC v. Maryland Cup Corp.*, 785 F. 2d 471, 477 (4th Cir. 1986). Here, the Employer contends that some entertainers only work for a day or short period of time, thus, making the request burdensome. However, the request is limited to the period of July 1, 2014, to the present, less than a year, and such documents are regularly kept in the course of business, as demonstrated by the Employer's practice of securing executed leases by entertainers before they begin working at the facility. Further, even if an employer is required to produce thousands of documents, this alone does not support a petition to revoke. See *NLRB v. GHR Energy Corp.*, 707 F.2d 110, 113-114 (5th Cir. 1982) (holding that "the mere fact that compliance with subpoenas may require the production of thousands of

documents" is insufficient to establish burdensomeness). Notably, the Employer was apparently able to easily locate the Charging Party's lease when seeking to enforce the very mandatory arbitration clause and class and collective action waivers at issue. The Employer should, therefore, be required to produce all of the leases, pursuant to Request No. 1, or alternatively, provide the detailed information sought in Request No. 2(b).

6. The Employer's specific objections to Request No. 3 also lack merit. Request No. 3 seeks documents that show all work rules, policies or conditions of employment, applicable to all individuals at the Employer's facility, that require mandatory arbitration of employment-related disputes and an individual's waiver of his/her right to litigate and pursue class and collective action for employment-related disputes. First, the Employer argues that the employee handbook is not relevant to the charge allegations, as entertainers, such as the Charging Party, were not provided with copies of the employee handbook because they are not employees, but instead independent contractors. Regardless of the status of entertainers and contrary to the Employer's assertion, the amended charge alleges the Employer's unlawful maintenance of mandatory arbitration provisions and class and collective action waivers for all employees, and the unlawful enforcement of such provisions against employees. During the ongoing investigation, the Employer acknowledged that there is an employee handbook. The Employer also acknowledged that some individuals who work at its facility are subject to the employee handbook and some are subject to the entertainment lease. Although the Employer argues that entertainers are not employees, the Subregion has not determined whether the entertainers are employees within the meaning of the Act; however, if entertainers are found to be employees, then the employee handbook and its policies will apply to all of the entertainers. Also, even if the Subregion finds that the entertainers are independent contractors, the allegation remains that

such policies apply to all remaining employees. Board policy provides that any person can file a charge on behalf of employees. 29 CFR § 102.9. Also see *Operating Engineers Local 39 (Kaiser Foundation)*, 268 NLRB 115, 116 (1983) ("The simple fact is that anyone for any reason may file charges with the Board.") Thus, even if the Charging Party does not enjoy the protections of the Act, she is not precluded from filing a charge on behalf of others – the staff – who are employees within the meaning of the Act.

Second, the Employer argues that the content of the employee handbook is irrelevant to the issue of whether enforcement of a class action waiver within an entertainment lease is unlawful. However, the Employer's argument ignores the allegation of unlawful maintenance of mandatory arbitration policies and class and collective action waivers. In this regard, the charge broadly alleges the maintenance of mandatory arbitration provisions and class and collective action waivers, which as discussed, could apply to any classification of employee at the Employer's facility. Therefore, this argument does not negate the need for the production of these policies, if they exist, in formats other than the entertainment lease.

Finally, the Employer argues that the request does not describe with sufficient particularity the evidence which is required. To the contrary, Request No. 3 explicitly seeks all documents, including the employee handbook and company guidelines, which show the Employer's policies mandating arbitration of employment-related disputes and which require that individuals waive their right to litigate and pursue class or collective action regarding their employment-related disputes. The Subregion seeks the entire handbook and other documents that contain these policies in order to ensure that the policies are read in the appropriate context.

In sum, Counsel for General Counsel submits that the investigative subpoena seeks information clearly relevant to matters under investigation and describes with sufficient particularity the evidence sought as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Accordingly, the Employer's petition to revoke, in part, should be denied.

Dated at Winston-Salem, North Carolina, on the 22nd day of May 2015.

Respectfully submitted,

Ashley L. Banks by SAM

Ashley L. Banks
Counsel for General Counsel
National Labor Relations Board
Region 10, Subregion 11
4035 University Parkway, Suite 200
P.O. Box 11467
Winston-Salem, North Carolina 27116-1467

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Counsel for General Counsel's Opposition to the Employer's Petition to Revoke, in part, Subpoena Duces Tecum B-1-MBDR2V was served by electronic mail on May 22, 2015, on the following:

Edward M. Cherof, Esq.
cherofe@jacksonlewis.com

Dated at Winston-Salem, North Carolina, this 22nd day of May 2015.

Ashley L. Banks by SM

Ashley L. Banks
Counsel for General Counsel
National Labor Relations Board
Region 11, Subregion 10
4035 University Parkway, Suite 200
P. O. Box 11467
Winston-Salem, North Carolina 27116-1467

EXHIBIT A

FORM EXEMPT UNDER 44 U S C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
10-CA-145882	2/6/15

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1 EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh

b. Tel No. 919-250-9826

c. Cell No.

f. Fax No. 919-854-0044

d. Address (Street, city, state, and ZIP code)
3210 Yonkers Road
Raleigh, NC 27604

e. Employer Representative
Jackson Lewis PC, Patricia Holland
1400 Crescent Green Ste. 215
Cary, NC 27518

g. e-Mail
patricia.holland@jacksonlewis.c

h. Number of workers employed
over 1,000

i. Type of Establishment (factory, mine, wholesaler, etc.)
Entertainment Club

j. Identify principal product or service
Entertainment club with exotic dancers

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act

2 Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)
Since on or about August 12, 2014, the above-referenced Employer has sought to enforce a waiver of the right (1) to mediate/arbitrate employment/FLSA disputes on a collective basis; and (2) to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b), against Leslie Holden, in violation of the NLRB decisions D.R. Horton, 357 NLRB No. 184 (January 2012), and Murphy Oil USA, Inc. 361 NLRB No. 72 (October 2014).

The Employer has sought to enforce a waiver of Ms. Holden's NLRA right to pursue collectively pursue litigation in all forums judicial and arbitral.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
Leslie Holden

4a. Address (Street and number, city, state, and ZIP code)
[redacted]
Marietta, GA 30067

4b. Tel. No. 919-607-77742

4c. Cell No.

4d. Fax No.

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6 DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief

By B. Sosa-Morris (signature of representative or person making charge)

Beatriz Sosa-Morris (Print/type name and title or office, if any)

2/5/2015 (date)

Address 711 West Alabama St. Houston, TX 77006

Tel No. 713-523-0001

Office, if any, Cell No.

Fax No. 713-523-1116

e-Mail
bsosamorris@kennedyhodges.cc

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RALEIGH RESTAURANT CONCEPTS, INC. D/B/A THE MEN'S CLUB OF RALEIGH Charged Party and **LESLIE HOLDEN** Charging Party	**Case 10-CA-145882**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on February 6, 2015, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Patricia Holland
Jackson Lewis PC
1400 Crescent Green
Ste 215
Cary, NC 27518-8118

Raleigh Restaurant Concepts, Inc. d/b/a The
Men's Club of Raleigh
3210 Yonkers Rd
Raleigh, NC 27604-3654

February 6, 2015
Date

Shannon R. Meares, Designated Agent of NLRB
Name

/s/ Shannon R. Meares
Signature

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
Amended CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
10-CA-145882	4/29/15

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Raleigh Restaurant Concepts, Inc. d/b/a The Men s Club of Raleigh

b. Tel. No. 919-250-9826

c. Cell No.

f. Fax No. 919-854-0044

g. e-Mail
patricia.holland@jacksonlewis

h. Number of workers employed
1000

d. Address *(Street, city, state, and ZIP code)*
3210 Yonkers Road
Raleigh, NC 27604

e. Employer Representative
Jackson Lewis P.C.
1400 Crescent Green Street, Suite 215
Cary, NC 27518

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Entertainment Club

j. Identify principal product or service
Entertainment club with exotic dancers

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 a), subsections 1) and *(list subsections)* of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
Since on or about August 2014 and continuing to the present, the Employer has maintained policies including a Mandatory Arbitration provision and Class and Collective Action Waiver.
Since on or about August 12, 2014, the above-referenced Employer has sought to enforce a waiver of the right (1) to mediate/arbitrate employment/FLSA disputes on a collective basis; and (2) to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b), against Leslie Holden, in violation of the NLRB decisions D.R Horton, 357 NLRB No. 184 (January 2012), and Murphy Oil USA, Inc., 361 NLRB No. 72 (October 2014).The Employer has sought to enforce a waiver of Ms. Holden s NLRA right to pursue collectively pursue litigation in all forums judicial and arbitral.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Leslie Holden

4. Address *(Street and number, city, state, and ZIP code)*
[redacted]t
Atlanta, GA 30313

4b. Tel. No. 919-607-7742

4c. Cell No.

4d. Fax No.

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By B. Sosa-Morris
(signature of representative or person making charge)

Beatriz Sosa-Morris
(Print/type name and title or office, if any)

Tel. No. 713-523-0001

Office, if any, Cell No.

Fax No. 713-523-1116

e-Mail
bsosamorris@kennedyhodges.c

Address 711 West Alabama St. Houston, TX 77006

04/29/2015
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RALEIGH RESTAURANT CONCEPTS, INC. D/B/A THE MEN'S CLUB OF RALEIGH Charged Party and **LESLIE HOLDEN** Charging Party	**Case 10-CA-145882**

AFFIDAVIT OF SERVICE OF FIRST AMENDED CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on April 30, 2015, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Edward M. Cherof, Esq.
Jackson Lewis P.C.
1155 Peachtree St NE Ste 1000
Atlanta, GA 30309-3630

Raleigh Restaurant Concepts, Inc. d/b/a The
Men's Club of Raleigh
3210 Yonkers Rd
Raleigh, NC 27604-3654

April 30, 2015
Date

Lisa A. Davis, Designated Agent of NLRB
Name

/s/ Lisa A. Davis
Signature

EXHIBIT B

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records
Raleigh Restaurant Concepts, Inc.
d/b/a The Men's Club of Raleigh
3210 Yonkers Rd.
Raleigh, NC 27604-3654

As requested by ASHLEY L. BANKS, on behalf of the General Counsel

whose address is 4035 University Pkwy Ste 200, Winston Salem, NC 27106-3275
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE the Regional Director or his/her designee of the National Labor Relations Board

at 4035 University Pkwy Ste 200

in the City of Winston Salem, NC

on May 11, 2015 at 10:00 a.m. or any adjourned or rescheduled date to testify in Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh 10-CA-145882
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-MBDR2V

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Winston Salem, NC

Dated: 04-30-15

Chairman, National Labor Relations Board.

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Case 10-CA-145882

B-1-MBDR2V

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ⊘ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

04-30-15

(Month, day, and year)

Briana C. Ray

(Name of person making service)

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

JA000053

ATTACHMENT

DEFINITIONS AND INSTRUCTIONS

a. **"Document"** means any existing printed, typewritten or otherwise recorded material of whatever character, records stored on computer or electronically, records kept on microfiche or written by hand or produced by hand and graphic material, including without limitation, checks, cancelled checks, computer hard drives, discs and/or files and all data contained therein, computer printouts, E-mail communications and records, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, licenses, files, letters, facsimile transmissions, memoranda, telegrams, minutes, notes, contracts, agreements, transcripts, diaries, appointment books, reports, records, payroll records, books, lists, logs, worksheets, ledgers, summaries of records of telephone conversations, summaries of records of personal conversations, interviews, meetings, accountants' or bookkeepers' work papers, records of meetings or conference reports, drafts, work papers, calendars, interoffice communications, financial statements, inventories, news reports, periodicals, press releases, graphs, charts, advertisements, statements, affidavits, photographs, negatives, slides, disks, reels, microfilm, audio or video tapes and any duplicate copies of any such material in the possession of, control of, or available to the subpoenaed party, or any agent, representative or other person acting in cooperation with, in concert with or on behalf of the subpoenaed party.

b. "Employer" means Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh.

c. "Employer's facility" means the facility located at 3210 Yonkers Road, Raleigh, North Carolina.

d. "Person" or "persons" means natural persons, corporations, limited liability companies, partnerships, sole proprietorships, associations, organizations, trusts, joint ventures, groups of natural persons or other organizations, or any other kind of entity.

e. "Period covered by this subpoena" means the period from July 1, 2014, through the present and the subpoena seeks only documents from that period unless another period is specified. This subpoena request is continuing in character and if additional responsive documents come to your attention after the date of production, such documents must be promptly produced.

f. Any copies of documents that are different in any way from the original, such as by interlineation, receipt stamp, notation, or indication of copies sent or received, are considered original documents and must be produced separately from the originals.

g. If any document covered by this subpoena contains codes or classifications, all documents explaining or defining the codes or classifications used in the document must also be produced.

h. Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

i. All documents produced pursuant to this subpoena should be presented as they are kept in the usual course of business or organized by the subpoena paragraph to which the document or set of documents is responsive.

j. This subpoena applies to documents in your possession, custody, or control.

k. If a claim of privilege is made as to any document which is the subject of this subpoena, a claim of privilege must be expressly made and you must describe the nature of the withheld document, communication, or tangible thing in a manner that, without revealing information itself privileged or protected, will enable an assessment of the claim to be made.

l. Unless otherwise stated, this subpoena does not supersede, revoke or cancel any other subpoena(s) previously issued in this proceeding.

DOCUMENTS TO BE PRODUCED

1. All entertainment leases signed by individuals who worked at the Employer's facility during the period covered by this subpoena.

2. To the extent that all versions of the entertainment leases identified in Request #1 are identical (except for the named individual who signed the lease), in lieu of providing copies of all leases signed by individuals, for the period covered by the subpoena, provide:

    a) a single copy of each version (if the provisions of the lease differ) of entertainment leases signed by individuals who worked at the Employer's facility; and

    b) a list of names for all individuals who signed the respective version of the entertainment lease, the date their lease was executed, and the duration period of their lease.

3. Documents, including employee handbooks and company guidelines, that show all work rules, policies, or other conditions of employment in effect for all individuals at Employer's facility, excluding supervisors and managerial employees, during the period covered by this subpoena, including documents showing any changes to the rules, the effective dates of any such changes, and a description or statement of the changes, that require:

    a) the mandatory arbitration of all controversies, claims, and/or disputes arising between the Employer and individuals who worked at the Employer's facility;

    b) that individuals waive their right to litigate, in a court of law, all controversies, claims, and/or disputes arising between the Employer and individuals who worked at the Employer's facility; and

    c) that individuals who worked at the Employer's facility waive their right to class and collective action for any and all controversies, claims, and/or disputes arising out of their work at the Employer's facility.

UNITED STATES POSTAL SERVICE
2015 MAY 15
PM 1 3

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

NATIONAL LABOR RELATIONS BOARD
REGION 11
4035 UNIVERSITY PARKWAY, SUITE 200
WINSTON-SALEM, NC 27106-2315

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Custodian of Records
Raleigh Restaurant Concepts, Inc
d/b/a The Men's Club of Raleigh
3210 Yonkers Rd
Raleigh, NC 27604-3654

10: 10-CA-145882 4-30-15 B.R

2. Article Number (Transfer from service label) 7013 1090 0000 9913 2302

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☒ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery 5-5-15

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

Exhibit F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RALEIGH RESTAURANT CONCEPTS, INC.
d/b/a THE MEN'S CLUB OF RALEIGH

and Case 10-CA-145882

LESLIE HOLDEN

ORDER[1]

The Employer's petition to revoke subpoena duces tecum B-1-MBDR2V is denied. The subpoena seeks information relevant to the matter under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Further, the Employer has failed to establish any other legal basis for revoking the subpoena. See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).

Dated, Washington, D.C., July 20, 2015.

MARK GASTON PEARCE, CHAIRMAN

KENT Y HIROZAWA, MEMBER

LAUREN McFERRAN, MEMBER

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO. 5:15-CV-00438-D

NATIONAL LABOR RELATIONS BOARD Applicant, vs. RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH, Respondent.	)	**RESPONDENT'S OPPOSITION TO APPLICATION FOR ORDER ENFORCING SUBPOENA *DUCES TECUM***

Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh ("Respondent" or the "Company"), respectfully submits Respondent's Opposition to Application for Order Enforcing Subpoena *Duces Tecum* in response to the National Labor Relations Board's ("Board" or "NLRB") Application for Order Enforcing Subpoena *Duces Tecum* ("Application"). [DE # 1].

I. General Background

On June 13, 2014, Leslie Holden, an exotic dancer, filed a collective and class action in this Court against Respondent, alleging violations of the Fair Labor Standards Act and the North Carolina Wage and Hour Act. See, Complaint, attached as Exhibit 1. In 2012 and 2013, Ms. Holden voluntarily entered into several entertainment leases with Respondent, which allowed her to perform as an entertainer at the Men's Club (the "Club") in Raleigh, North Carolina. By the express terms of the entertainment leases, Ms. Holden is an independent professional entertainer, and is not employed by the Club. Such agreements are common within this industry. See, Position Statement, attached as Exhibit 2.

In exchange for providing a safe environment in which for her to engage in her independent entertainment services, [1] Ms. Holden paid Respondent a rental fee pursuant to the entertainment lease. See, Entertainment Lease, attached as Exhibit 3. Both of the entertainment leases signed by Ms. Holden, as well as the leases signed by other independent professional entertainers who performed at the Club, are virtually identical. See, Exhibit 2.

The entertainment leases contain a mandatory arbitration provision stating:

> **ANY AND ALL CONTROVERSIES BETWEEN ENTERTAINER AND CLUB, REGARDLESS OF WHETHER SUCH CLAIMS SOUND IN . . . A FEDERAL, STATE OR LOCAL STATUTE REGULATION OR CODE, SHALL BE EXCLUSIVELY DECIDED BY BINDING ARBITRATION.**

See, Exhibit 3. The entertainment leases also contained a collective or class action waiver stating:

> **THE ENTERTAINER EXPRESSLY WAIVES HER RIGHT TO PROSECUTE, PARTICIPATE IN, OR PURSUE A CLASS OR COLLECTIVE ACTION AND/OR OTHER JOINT PROCEEDINGS AGAINST [RESPONDENT].**

See, Exhibit 3 at ¶ 21.C. The entertainment leases expressly reference the Federal Arbitration Act, stating that binding arbitration shall be held "**PURSUANT TO AND IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT ("FAA").**" See, Exhibit 3 at ¶ 21.A. Entertainment leases expire annually, and Respondent has used the same entertainment lease, or one very similar, since 2008. See, Exhibit 2.

With respect to Ms. Holden's wage hour claims, Respondent asserted its rights under the entertainment leases and filed a Motion to Dismiss and/or to Stay and to Compel Arbitration on August 12, 2014. See, Motion to Dismiss and/or to Stay and to Compel Arbitration, attached as

[1] In accord with the lease, Respondent provided a stage area, music, lighting, dressing room facilities, and advertisement. See, Exhibit 3 at ¶2.A.–C.

Exhibit 4. On November 20, 2014, Judge James C. Fox, Senior United States District Judge, granted Respondent's motion to the extent it sought to compel arbitration and stayed Ms. Holden's suit. See, Order, attached as Exhibit 5 (stating that "[t]he Federal Arbitration Act … reflects a liberal policy in favor of arbitration agreements" and finding that Charging Party's argument that arbitration "strip[s] her of her substantive rights that the FLSA provides" unpersuasive).

On February 6, 2015 Charging Party filed an unfair labor practice charge (the "Charge") with the National Labor Relations Board (the "Board", or "NLRB"). See, Charge, attached as Exhibit 6. The Charge alleges that Respondent violated Section 7 of the National Labor Relations Act (the "Act"), by maintaining or enforcing a mandatory arbitration policy with a class or collective action waiver. See, Exhibit 6. As set forth below, the Board's position has been rejected by various Supreme Court decisions as well as every Circuit Court which has considered the issue.

During the Region's investigation, Respondent provided the Regional office of the Board (the "Region") with the entire entertainment lease, which Charging Party and other entertainers signed, explained that the entertainment leases are nearly identical, and indicated that entertainment leases expire annually. See, Exhibit 2. Further, in turning over the leases and all documents executed by Ms. Holden, Respondent directly and completely addressed the sole issues relevant to the allegations in the Charge: (1) that neither Charging Party nor any other entertainer, by virtue of their independent professional entertainer status, are Respondent's employees and; (2) the maintenance of mandatory arbitration and collective or class action waivers are valid and enforceable in accordance with the FAA. Respondent also explained that

while Club employees, such as wait staff, received copies of an employee handbook, no entertainer received a copy of the Company's employee policies or handbook.

On April 29, 2015, Ms. Holden amended her Charge, by adding the following sentence, "Since on or about August 2014 and continuing to present, the Employer has maintained policies including a Mandatory Arbitration provision and Class and Collective Action Waiver. See, Amended Charge, attached as Exhibit 7 (emphasis added). With the exception of the word policies, Ms. Holden's original Charge already contained these allegations. The next day, on April 30, 2015, the Board served Subpoena B-1-MBDR2V ("Subpoena") on Respondent. See, Subpoena, attached as Exhibit 8.

As set forth more fully below, the subpoena seeks two pieces of information wholly irrelevant to the Board's investigation into Ms. Holden's claims: a) arbitration agreements and class action waivers which may be applicable to those individuals who work at the Men's Club as *employees*, *not as entertainers*, and, b) each and every entertainment lease entered into by other entertainers over the time period beginning July 1, 2014 to the present.

Both of these requests are irrelevant to Ms. Holden's claims. Moreover, they are sought in furtherance of a legal claim that has been soundly rejected by the Courts. See, D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013); See, also American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013); CompuCredit v. Greenwood, 132 S. Ct. 665 (2012); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014); Richards v. Ernst & Young, LLP, 744 F. 3d 1072, 1075, n.3 (9th Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013); Sutherland v. Ernst & Young, 726 F.3d 290 (2d Cir. 2013); Murphy Oil USA, Inc. v. NLRB, Case No.: 14-60800 (5th Cir.) (currently pending before the Fifth Circuit).

For these reasons, explained below, the NLRB's Application should be denied or, in the alternative, held in abeyance pending further proceedings in Murphy Oil USA, Inc., Case No.: 14-60800 (5th Cir.).

II. The Subpoena *Duces Tecum.*

As set forth below, the Subpoena seeks to require Respondent to produce information that is either irrelevant to the issue at hand, or redundant given the Respondent's document production. See, Exhibit 8.

First, the Board seeks to require Respondent to produce an unknown number of entertainment leases signed by any individual who worked at 3210 Yonkers Road, Raleigh, North Carolina for any period of time, no matter how short,[2] since July 14, 2014, or, in the alternative, compile a list containing the name of each such individual, along with, the exact date the lease was executed and the duration of each individual's lease. Id.[3] Next the Board seeks to require Respondent to produce information that was never furnished to an entertainer and which no entertainer was expected to comply with:

> Documents, including employee handbooks and company guidelines, that show all work rules, policies, or other conditions of employment in effect for all individuals at Employer's facility, excluding supervisors and managerial employees, during the period covered by this subpoena, including documents showing

[2] It is worth noting that the entertainers set their own schedules and work intermittently. Indeed, some entertainers worked for a single day, or less, during the term of their entertainment lease.

[3] Specifically, the Subpoena, states:

> DOCUMENTS TO BE PRODUCED 1. All entertainment leases signed by individual who worked at the Employer's facility during the period covered by this subpoena. 2. To the extent that all versions of the entertainment leases identified in Request #1 are identical (except for the named individual who signed the lease), in lieu of providing copies of all leases signed by individuals, for the period covered by the subpoena, provide: a) a single copy of each version (if the provisions of the lease differ) or entertainment leases signed by individuals who worked at the Employer's facility; and b) a list of names for all individuals who signed the respective version of the entertainment lease, the date their lease was executed, and the duration period of their lease.

any changes to the rules, the effective dates of any such changes, and a description or statement of the changes, that require:

a) the mandatory arbitration of all controversies, claims, and/or disputes arising between the Employer and individuals who worked at the Employer's facility;
b) that individuals waive their right to litigate, in a court of law, all controversies, claims, and/or disputes arising between the Employer and individuals who worked at the Employer's facility; and
c) that individuals who worked at the Employer's facility waive their right to class and collective action for any and all controversies, claims, and/or disputes arising out of their work at the Employer's facility.

See, Exhibit 8.

On May 7, 2015, Respondent timely filed a Petition to Partially Revoke the Subpoena ("Petition to Revoke"). See, Respondent's Petition to Revoke, In Part, Subpoena *Duces Tecum* Number: B-1-MBCR2V, attached as Exhibit 9. Respondent explained that it had already furnished relevant documentation to the Board and objected to the investigation of mandatory arbitration policies containing collective or class action waivers. See, Exhibit 2; See, also Exhibit 9.

On July 20, 2015, the Board denied Respondent's Petition to Revoke, giving rise to the instant action. See, Board Order, attached as Exhibit 10. The Board found that the documents requested were relevant citing NLRB v. North Bay Plumbing, Inc., 102 F.3d 1005 (9th Cir. 1996) and NLRB v. Carolina Food Processors, Inc., 81 F.3d 507 (4th Cir. 1996). See, Exhibit 10. The Board's Order failed to address the fact that neither of these cases, however, arise out of the investigation of a charge that the Supreme Court and every other Circuit Court addressing the issue has expressly or implicitly found to be governed by the FAA, not the NLRA. See, e.g., D.R. Horton, Inc., 737 F.3d 344.

III. This Court Should Deny the Board's Application.

Pursuant to 29 U.S.C. § 161, the Board has the power to investigate unfair labor practices and to issue subpoenas. The Board's investigative powers, however, are limited. Allied Waste Servs., 2014 NLRB LEXIS 1011 (N.L.R.B. Dec. 31, 2014) (explaining various limitations to the Board's power to issue investigative subpoenas). The information sought must be relevant. See, Perdue Farms, Cookin' Good Div. v. NLRB, 144 F.3d 830, 834 (D.C. Cir. 1998). "Relevancy of an adjudicative subpoena is measured against the charges specified in the complaint." Dow Chemical Co. v. Allen, 672 F.2d 1262, 1268 (7th Cir. 1982) [citations omitted]. The party requesting the documents has the burden of establishing their relevancy. See, NLRB v. Pinkerton's Inc., 621 F.2d 1322 (6th Cir. 1980). The Board does not have "roving investigatory powers" and cannot initiate its own charge. See, Chamber of Commerce of the United States v. NLRB, 721 F.3d 152 (4th Cir. 2013). Further, the Board does not have "carte blanche to expand the [investigation] as [it] might please" beyond the scope of the charge. Allied Waste Servs., 2014 NLRB LEXIS 1011.

The Board's limited investigatory power is no accident. Id. Rather, Congress intended to limit the Board's subpoena power. NLRB v. Interbake Foods, LLC, 637 F.3d 492, 498–99 (4th Cir. 2011)(explaining that Congress requires the NLRB to seek the approval of Article III Courts to enforce an administrative subpoena). District courts do not enforce administrative subpoenas as a matter of course. EEOC v. Ocean City Police Dep't, 820 F.2d 1378, 1379 (4th Cir. 1987)("[T]he district court is not merely a rubber stamp in an enforcement proceeding."). To the contrary, District Courts serve an important gate keeping function. Interbake, 637 F.3d at 498-99 ("This reservation of authority to Article III courts protects against abuse of the subpoena power.").

A. The Subpoena Seeks Irrelevant and Redundant Information.

The NLRB is the federal agency tasked with enforcement of the National Labor Relations Act ("NLRA"). 29 U.S.C. §§ 151–161. The NLRA, however, only applies to employees. 29 U.S.C. § 152; NLRB v. Labor Ready, Inc., 253 F.3d 195, 199 (4th Cir. 2001). The Board's Subpoena requests information that has either already been provided or is irrelevant to the issue of whether Charging Party, or any other entertainer, is an independent professional entertainer. See, Exhibit 8.

1. Entertainment Leases

The Subpoena seeks entertainment leases or information contained within these leases. See, Exhibit 8. However, Respondent has *already* provided the Board with the entire entertainment lease signed by charging party or other independent professional entertainers during 2014. See, Exhibit 2. Further, Respondent has already notified the Board that all of the requested entertainment leases for 2014 are identical except for the parties to the Agreement. See, Exhibit 2 (explaining that all entertainment leases are virtually identical in a letter dated April 2, 2015); See, also Exhibit 9. Moreover, Respondent has already explained that entertainment leases expire annually. See, Exhibit 2. The only information the Board seeks that has not already been provided is the names of the entertainers who signed the entertainment leases and the dates those entertainers signed these leases. This requested information, however, is irrelevant to the issue of whether Charging Party is, or other entertainers are, employees. As Respondent has previously explained to the Region, the Company does not: pay entertainers for their services, require entertainers to perform for any particular customer, have the authority to require entertainers' attendance, set entertainers' schedules, or restrict entertainers' performances other than by requiring compliance with the law. See, Exhibit 2. Clearly, an individual's name

is not probative of whether or not she is, or other entertainers are, employees pursuant to the NLRA, because all have the same independent professional entertainer relationship with Respondent. For these reasons, the Court should deny the Board's Application.

2. Employee Handbook and Policies

The Subpoena also seeks *employee* handbooks and policies. See, Exhibit 8. This information is irrelevant to the allegations in the Charge. See, Exhibit 6; See, also Exhibit 7 (stating that Respondent has "sought to enforce a waiver of Ms. Holden's NLRA right to pursue collectively pursue litigation in all forums judicial and arbitral") [emphasis added]. As previously explained, neither Charging Party, nor any other entertainer: received a copy of the handbook or employee policies; was subject to the handbook or employee policies; or was affected by the handbook or employee policies. See, Exhibit 2. Consequently, handbooks or policies that Charging Party never received, was never subjected to, and was never affected by, are irrelevant to the issue of whether Charging Party is an employee pursuant to Section 2(2) of the NLRA. To the contrary, the Board has impermissibly used Charging Party's allegations as an excuse to initiate its own charge, investigate unrelated matters and impermissibly expand the investigation. Allied Waste Servs., 2014 NLRB LEXIS 1011. As Congress intended, this Court should exercise its important gate keeping function and prevent the Board from abusing its subpoena power. See, Interbake, 637 F.3d at 498-99; See, also Ocean City Police Dep't, 820 F.2d at 1379.

B. The Subpoena Seeks Information Supporting The Board's Clearly Meritless Position That The Mandatory Arbitration Agreement Should Not Be Enforced In Accordance With Its Terms Pursuant To the Federal Arbitration Act.

The Federal Arbitration Act governs the validity of mandatory arbitration policies containing class or collective action waivers. See, American Express Co., 133 S. Ct. 2304.

Arbitration agreements containing class or collective action waivers are enforceable in accordance with their terms. See, CompuCredit, 132 S. Ct. at 669; See, also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683 (2010)(The parties to an arbitration "may agree to limit the issues they choose to arbitrate," and "may specify with whom they choose to arbitrate."). Arbitration agreements involving federal statutory rights are enforceable unless Congress has evinced an intention when enacting a statute to override the FAA. See, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). Congress evinced no such intent when drafting the NLRA. The FAA applies to employment agreements containing class action waivers. See, Circuit City Store, Inc. v. Adams, 532 U.S. 105, 118 (2001).

The Board's position that such agreements violate the NLRA is contrary to Supreme Court precedent and has been either expressly or implicitly rejected by every Circuit Court which has considered it. See, D.R. Horton, Inc., 737 F.3d 344; See, also American Express Co., 133 S. Ct. 2304; CompuCredit, 132 S. Ct. 665; Walthour, 745 F.3d at 1336; Ernst & Young, LLP, 744 F. 3d at 1075, n.3; Bristol Care, Inc., 702 F.3d 1050; Ernst & Young, 726 F.3d 290. In D.R. Horton, the Fifth Circuit explicitly ruled that the Board erroneously held that an employer violated the NLRA by requiring employees to sign an arbitration agreement containing collective/class action waivers. 737 F.3d 344. Specifically, relying upon controlling United States Supreme Court precedent cited above, the Fifth Circuit explained that the Board's decision failed to afford proper deference to the policies favoring arbitration pursuant to the FAA. D.R. Horton Inc., 737 F.3d 344.

On March 22, 2012 and again on January 22, 2013, Charging Party voluntarily entered into an entertainment lease containing a mandatory arbitration clause and a class or collective action waiver. See, Exhibit 2. As set forth above, and in accordance with the Fifth Circuit's

decision in D.R. Horton, the validity of Charging Party's agreement is governed by the FAA, not the NLRA. See, American Express Co. 133 S. Ct. 2304; CompuCredit, 132 S. Ct. 665; Walthour, 745 F.3d at 1336; Richards, 744 F. 3d at 1075; Bristol Care, Inc., 702 F.3d 1050; Ernst & Young, 726 F.3d 290.

To further buttress Respondent's claim, both Charging Party and Respondent intended that this agreement be executed in accordance with the FAA. Entertainment Lease, at ¶ 21.A.[4] Faced with the overwhelming weight of this authority, this Court should not allow the Board to continue its fishing expedition while they pursue a wholly futile position. On these grounds alone, the Court should deny the Board's Application to enforce its Subpoena.

IV. To the Extent that the Court Is Not Inclined to Deny the Board's Application, This Proceeding Should Be Held in Abeyance.

As noted above, on December 3, 2013, the Fifth Circuit set aside the Board's decision that invalidated a Company's arbitration agreement containing class action waivers. D.R. Horton, 737 F.3d 244. Following the Fifth Circuit's decision, on October 28, 2014, the Board issued yet another decision that was contrary to the weight of precedent, and invalidated a mandatory arbitration agreement containing class or collective action waivers. Murphy Oil USA, Inc., 361 NLRB No. 72 (2014). In November 2014, Murphy Oil filed a petition for review of the Board's decision in the United States Court of Appeals for the Fifth Circuit. Given the Board's clear disregard of the Fifth Circuit's decision in D.R. Horton, Murphy Oil requested that the Fifth Circuit issue a writ seeking to enjoin the Board from continuing its willful non-acquiescence. See, Motion to Hold in Abeyance The Board's Filing of The Agency's Certified

[4] The Charging Party's challenge to the validity of the arbitration clause at issue here has been rejected by Judge Fox. (*See*, Order Compelling Arbitration, Case No. 5:14-cv-00348-F, DE # 16). The Charging Party has been ordered to arbitration. (*See*, Order to Show Cause, *Id*, at DE # 19).

Record Pending the Court's Disposition of the Board's Motion to Hold the Case in Abeyance, attached as Exhibit 11.

To the extent that the Court is not inclined to deny the Board's Application, Respondent respectfully requests that the Court hold this proceeding in abeyance pending the Fifth Circuit's opinion in Murphy Oil USA, Inc., (especially given the fact that the Respondent in that case has sought equitable remedies). See, GTE South, Inc. v. Morrison, 199 F.3d 733, 743–44 (4th Cir. 1999)(holding a case in abeyance until the Eighth Circuit resolved the issue reasoning that if the Court applied the rules as they stand now, the Eighth Circuit may invalidate some or all of the current rules). See, Exhibit 11.

It is worth noting the Board made a similar argument in a motion filed in Leslie Poolmart, Inc. v. NLRB, Case No. 15-60627 (2015). See, Exhibit 11 (requesting that the Court hold the filing of the Board's certified record explaining that "On September 23, the Board filed a motion asking the Court to hold this case in abeyance until the Court issues decisions in *Murphy Oil USA, Inc. v. NLRB*, 5th Cir. Case No. 14-60800 . . . which presents identical issues to those in this case").

For the above stated reasons, Respondent respectfully requests that this Court deny the Board's Application for an Order Seeking to Enforce the Subpoena *Duces Tecum* or alternatively, to Stay this action pending the Fifth Circuit's decision in *Murphy Oil.*

Respectfully submitted this the 20th day of October, 2015.

JACKSON LEWIS, P.C.

/s/Edward M. Cherof
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ATTORNEYS FOR RESPONDENT RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION No. 5:15-cv-00438-D

NATIONAL LABOR RELATIONS BOARD,

Applicant,

vs.

RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that on October 16, 2015, the foregoing *Respondent's Opposition to Application for Order Enforcing Subpoena Duces Tecum* was electronically filed with the Clerk of the Court, using the Court's CM/ECF system, which will send notification of such filing as follows:

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U.S. Equal Employment Opportunity Commission
Senior Trial Attorney
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Attorney for Respondent

4843-4281-9113, v. 1

Exhibit 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
IN THE WESTERN DIVISION

LESLIE HOLDEN on Behalf of Herself and on Behalf of All Others Similarly Situated,	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO. 5:14-cv-00348**
RALEIGH RESTAURANT CONCEPTS, INC.,	§	**JURY TRIAL DEMANDED**
Defendant.	§	

PLAINTIFF'S ORIGINAL COMPLAINT, COLLECTIVE ACTION AND JURY DEMAND

SUMMARY

1. This is an action brought under the Fair Labor Standard Act ("FLSA"), 29 U.S.C. §§ 201, et seq., and the North Carolina Wage and Hour Act ("NCWHA"), N.C. Gen. Stat. §§ 95-25.1, et seq., to redress Defendant's long standing abuse of the federal and state minimum wage and overtime standards. Plaintiff brings this action as a collective action under 29 U.S.C. § 216(b) and as a class action pursuant to Fed. R. Civ. P. 23. The violations of the FLSA and the NCWHA are straightforward—the Defendant does not pay its employees anything.

2. Raleigh Restaurant Concepts, Inc. is an adult entertainment facility in Raleigh, North Carolina that operates under the assumed name Men's Club of Raleigh.

3. Leslie Holden ("Plaintiff") is a non-exempt employee who worked at Defendant's adult entertainment club, The Men's Club of Raleigh, as an exotic dancer. During her tenure as a dancer at that facility, she did not receive the FLSA or NCWHA mandated minimum wage for all hours worked nor did she receive time and a half her regular rate for each hour worked over 40 each week. In fact, Defendant refused to compensate her whatsoever for any hours worked. Plaintiff's only compensation came in the form of tips from club patrons. Moreover, Plaintiff was required to divide her tips with Defendant and other employees who do not customarily receive tips. Therefore, Defendant has failed to compensate Plaintiff at the federal and state mandated minimum wage rate.

SUBJECT MATTER JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

5. Supplemental jurisdiction over the state law claims is proper under 28 U.S.C. § 1367.

6. Venue is proper in the Western District of North Carolina pursuant to 28 U.S.C. § 1391 because a substantial portion of the events forming the basis of this suit occurred in this District, and Defendant's club is located in this District.

PARTIES AND PERSONAL JURISDICTION

7. Plaintiff Leslie Holden is an individual residing in Cobb County, Georgia. Plaintiff's written consent to this action is attached to this Complaint as "Exhibit A."

8. The Class Members are all current and former exotic dancers who worked at Defendant's adult entertainment club at any time starting three years before this Complaint was filed up to the present.

9. Defendant Raleigh Restaurant Concepts, Inc. is a corporation that does business as the facility known as The Men's Club of Raleigh in Raleigh (the "Men's Club"), North Carolina. This Defendant may be served process through its registered agent CT Corporation System, 150 Fayetteville, St. Box 1011, Raleigh, North Carolina 27601.

FLSA COVERAGE

10. At all material times, Defendant has been an employer within the meaning of 3(d) of the FLSA. 29 U.S.C. § 203(d).

11. At all material times, Plaintiff and Class Members were individual employees who engaged in commerce or in the production of goods for commerce as required by 29 USC § 206-207.

12. Furthermore, Defendant has had, and continues to have, an annual business volume in excesses of $500,000.

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

13. The FLSA and the NCWHA applied to Plaintiff and Class Members at all times in which they worked at Defendant's club.

14. No exemptions to the application of the FLSA or the NCWHA apply to Plaintiff or the Class Members. For instance, neither Plaintiff nor any Class Member has ever been a professional or artist exempt from the provisions of the FLSA or the NCWHA. The dancing required at the Men's Club does not require invention, imagination or talent in a recognized field of artistic endeavor and Plaintiff and Class

Members have never been compensated by Defendant on a set salary, wage, or fee basis. Rather, Plaintiff and Class Members' sole source of income while working for Defendant was tips given to them by the club's patrons, (i.e., stage dancing or single dancing tips).

15. At all relevant times, Plaintiff and each Class Member were employees of Defendant under the FLSA and the NCWHA. Upon information and belief, during the three years preceding the filing date of this action more than 100 dancers have worked at Defendant's club, all without being paid a penny of wages from Defendant.

16. Defendant has classified and continues to classify all of its dancers as independent contractors. In fact, Defendant actually states on their webpage that: "Our entertainers are private contractors, not employees, who make their own hours and pay for privilege (sic) of performing in our secure environment."[1]

17. Defendant's classification of Plaintiff as an independent contractor was not due to any unique factor related to her employment or relationship with Defendant. As a matter of common business policy, Defendant routinely misclassified all dancers as independent contractors as opposed to employees. As a result of this uniform misclassification, Plaintiff and Class Members were not paid the minimum wage or overtime wages required under the FLSA or the NCWHA.

18. During the relevant period, the employment terms, conditions, and policies that applied to Plaintiff were the same as those applied to the other Class Members who worked as dancers at Defendant's club.

19. During the relevant period, no Class Member received any wages or other compensation from Defendant. Class Members generated their income solely through the tips they received from Defendant's customers when they performed table, chair, couch,

[1] See, e.g., http://mensclubraleigh.com/jobs.aspx

or other dances. Additionally, Defendant imposed a fee schedule that actually resulted in Plaintiff and Class Members paying for the privilege of dancing at Defendant's club. Defendant assessed a daily house fee to be paid by Plaintiff and Class Members per shift and demanded a portion of the gratuity the dancer received for each dance.

20. The money that Plaintiff receives from Defendant's patrons is a tip, not a service charge, as those terms are defined in 29 C.F.R. §§ 531.52, 531.53, and 531.55.

21. The money that Plaintiff receives from Defendant's patrons does not become part of the Defendant's gross receipts to be later distributed to Plaintiff and the other dancers. Instead, Plaintiff and the other dancers merely pay the club a portion of their tips.

22. The full amount Class Members are given by patrons in relation to dances they perform are not taken into Defendant's gross receipts, with a portion then paid out to the dancers. Defendant issues neither 1099 nor W-2 forms to Class Members indicating any amounts being paid from their gross receipts to Class Members as service fees or wages.

23. Plaintiff and Class Members are tipped employees under the FLSA as they are engaged in an occupation in which they customarily and regularly receive more than $30 a month in tips.

24. However, Defendant is not entitled to take a tip credit for the amounts Plaintiff and Class Members received as tips. 29 U.S.C. § 203(m) requires an employer to inform its employee that it intends to rely on the tip credit to satisfy its minimum wage obligations. Here, Defendant affirmatively informed Plaintiff and the Class Members that they would not be paid at all, much less paid a tip credit adjusted minimum wage.

25. Furthermore, Defendant is unable to rely on the tip credit under North

Carolina state law because Defendant requires Plaintiff and the Class Members to share in excess of 15% of their tips. N.C. Admin Code § 12.0303.

26. Defendant's misclassification of Plaintiff and the Class Members as independent contractors was designed to deny them their fundamental rights as employees to receive minimum wages, overtime, to demand and retain portions of tips given to Class Members by customers, and all done to enhance Defendant's profits.

27. Defendant's misclassification of Plaintiff and Class Members as independent contractors was willful. Defendant knew or should have known that Plaintiff and the Class Members were improperly classified as independent contractors. Even a cursory examination of the law would have revealed this basic fact.

28. Employment is defined with "striking breadth" in the context of wage and hour laws. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325-26 (1992). The determining factor as to whether dancers like Plaintiff are employees or independent contractors under the FLSA or the NCWHA is not the dancer's election, subjective intent, or any contract she might enter into. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947); *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006). Instead, the test for determining whether an individual is an "employee" under the FLSA and the NCWHA is the economic realities test. Under that test, employee status turns on whether the individual is, as a matter of economic reality, in business for herself and truly independent, or rather is economically dependent upon finding employment in others.

29. Workers cannot validly elect to be treated as independent contractors instead of employees.

30. Workers likewise cannot agree to be paid less than the minimum wage.

31. Under the applicable test, courts utilize several factors to determine economic dependence and employment status. These factors are: (i) the degree of control exercised by the alleged employer, (ii) the relative investments of the alleged employer and employee, (iii) the degree to which the employee's opportunity for profit and loss is determined by the employer, (iv) the skill and initiative required in performing the job, (v) the permanency of the relationship, and (vi) the degree to which the alleged employee's tasks are integral to the employer's business.

32. The totality of the circumstance surrounding the relationship between Defendant and Plaintiff and Defendant and Class Members establishes economic dependence by the dancers on Defendant and thus employee status. As a matter of economic reality, Plaintiff and all other Class Members are not in business for themselves and truly independent, but rather are economically dependent upon finding employment in others, namely Defendant. The dancers are not engaged in occupations or business distinct from that of Defendant. Rather, their work is the basis for Defendant's business. Defendant obtains the customers who desire the dance entertainment and provide the workers who conduct the dance services on behalf of Defendant. Defendant retains pervasive control over the club operation as a whole and the dancer's duties are an integral part of the operation.

A. Degree of Control

33. Plaintiff and the Class Members do not exert control over a meaningful part of the club business and do not stand as separate economic entities from Defendant. Defendant exercises control over all aspects of the working relationship with Plaintiff and the other dancers in the club.

34. Plaintiff and Class Members' economic status is inextricably linked to those conditions over which Defendant have complete control. Plaintiff and the other dancers are completely dependent on Defendant for their earnings. The club controls all of the advertising and promotion without which Plaintiff and Class Members could not survive economically. Moreover, Defendant creates and controls the atmosphere and surroundings at the club, the existence of which dictates the flow of customers into the club. The dancers have no control over the customer volume or the atmosphere at the club.

35. Defendant employs guidelines and rules dictating the way in which a dancer, like Plaintiff or the Class Members, may conduct herself. Defendant sets the hours of operations, lengths of shifts dancers must work, the show time during which a dancer may perform, and sets minimum dance tips. Defendant also determines the sequence in which a dancer may perform on stage during her stage rotation, the themes of dancers' performances, including their costuming and appearances, their conduct at work (e.g., that they should be on the floor as much as possible when not on stage to mingle with the club's patrons), tip splits, and all other terms and conditions of employment.

36. Defendant requires that its dancers work a minimum number of shifts every week and each shift must be a minimum number of hours. Dancers are required to report in and report out and the beginning and end of every shift. If a dancer arrives late, leaves early, or misses a shift, that dancer is subject to fine, penalty, or reprimand by Defendant.

37. Defendant routinely schedules dancers to work in excess of 40 hours per week and knowingly permits dancers to work in excess of 40 hours per week regularly.

38. Defendant, not the dancers, set the minimum tip amount that dancers must collect from patrons when performing dances. Defendant announces the minimum tip amount to patrons in the club wishing to see the dances.

39. The entire sum a dancer receives from a patron for a dance is not given to Defendant and taken into its gross receipts. Instead, the dancers keep their share of the payment under the tip share policy and pay over to Defendant and the club the portion they demand as their share or "rent." For example, for a twenty dollar dance, Plaintiff would be required to pay the club ten dollars. Defendant issues no 1099 or W2 forms to any dancers characterizing or showing any sums being paid as service fees or wages.

40. Defendant establishes the split or percentage which each dancer is required to pay it for each type of dance they receive during their shift. In addition, amounts must be shared with disk-jockeys, door staff, and other employees as part of Defendant's tip sharing policy. Further, dancers are expected to assist Defendant in selling a drink quota per shift. The foregoing establishes that Defendant set the terms and conditions for all dancer's work. This is the hallmark of economic dependence.

B. Skill and Initiative

41. Plaintiff, like all other dancers at Defendant's club, does not exercise the skill and initiative of a person in business for herself.

42. Plaintiff and Class Members are not required to have any specialized or unusual skills to work at Defendant's club. Prior dance experience is not required as a prerequisite to employment. Dancers are not required to attain a certain level of skill in order to dance at Defendant's club. There are no certification standards for dancers. There are no dance seminars, no specialized training, no instructional booklets, and no choreography provided or required in order to work at Defendant's club. The dance

skills utilized are commensurate with those exercised by ordinary people dancing at a typical nightclub or a wedding.

43. Plaintiff, like the Class Members, does not have the opportunity to exercise the business skills and initiative necessary to elevate her status to that of an independent contractor. Dancers exercise no business management skills. They maintain no separate business structures or facilities. Dancers do not actively participate in any effort to increase the club's client base, enhance goodwill, or establish contracting possibilities. The scope of a dancer's initiative is restricted to decisions involving what clothes to wear (within Defendant's guidelines) or how provocatively to dance.

44. Plaintiff and Class Members are not permitted to hire or subcontract other qualified individuals to provide additional dances to patrons and increase their revenues, as an independent contractor in business for themselves would.

C. Relative Investment

45. Plaintiff's relative investment is minor when compared to the investment made by Defendant.

46. Plaintiff, like all other dancers, has made no capital investment in the facilities, advertising, maintenance, sound systems, lights, food, beverage, inventory, or staffing at Defendant's club. A dancer's investment is limited to expenditures on costumes or makeup. But for Defendant's provision of the lavish club work environment, the dancers would earn nothing.

D. Opportunity for Profit and Loss

47. Defendant, not the dancers like Plaintiff, manages all aspects of the business operation including attracting investors, establishing working hours and hours of

operation, setting the atmosphere, coordinating advertising, hiring and controlling the staff. Defendant, not the dancers, takes the true business risks for Defendant's club.

48. Dancers like Plaintiff and Class Members do not control the key determinations of profit and loss of a successful enterprise. Specifically, Plaintiff is not responsible for any aspect of the enterprise's on-going business risk. For example, Defendant is responsible for all financing, the acquisition and/or lease of the physical facilities and equipment, inventory, the payment of wages (for managers, bartenders, etc.), and obtaining all the appropriate business insurance and licenses.

49. Defendant, not the dancers, establishes the minimum dance tip amounts that should be collected from patrons when dancing.

50. The dance tips the dancers receive are not a return on a capital investment. They are a gratuity for services rendered. From this perspective, it is clear that a dancer's "return on investment" is no different than that of a waiter who serves food during a customer's meal at a restaurant.

E. Permanency

51. Plaintiff worked for over a year as a dancer at Defendant's club. On information and belief, other dancers have worked for Defendant for a significant period of time.

F. Integral Part of Employer's Business

52. Dancers, like Plaintiff and Class Members, are essential to the success of Defendant's club. The continued success of clubs such as Defendant's turns upon the provision of dances by the dancers for the club's patrons. In fact, the sole reason establishments like Alameda Strip exist is to showcase the dancers' physical attributes for their customers.

53. Moreover, Defendant is able to charge higher admission prices and a much higher price for their drinks than a comparable establishment without dancers because dancers are the main attraction of such clubs. As a result, the dancers are an integral part of Defendant's business.

54. The foregoing demonstrates that dancers like Plaintiff and Class Members are economically dependent on Defendant and subject to significant control by Defendant. Therefore, Plaintiff and Class Members were misclassified as independent contractors and should have been paid the minimum wage at all times they worked at Defendant's club and otherwise been afforded all rights and benefits of an employee under federal and state wage and hour laws.

55. All actions by Defendant herein described were willful, intentional, and not the result of mistake or inadvertence. Defendant was aware that FLSA and the NCWHA applied to the operation of Defendant's club at all relevant times and that under the economic realities test applicable to determining employment status under those laws the dancers were misclassified as independent contractors. Defendant was aware of, or through the exercise of reasonable diligence should have been aware, of the multitude of previous cases holding dancers identically situated to Plaintiff and Class Members were employees, not independent contractors. *See, e.g., Jeffcoat v. State, Dep't of Labor*, 732 P.2d 1073 (Alaska 1987) (dancers are employees); *Martin v. Circle C Investments, Inc.*, MO-91-CA-43, 1991 WL 338239 (W.D. Tex. Mar. 27, 1991) (dancers are employees); *Martin v. Priba Corp.*, CIV.A.3:91-CV-2786-G, 1992 WL 486911 (N.D. Tex. Nov. 6, 1992) (dancers are employees); *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324 (5th Cir. 1993) (dancers are employees); *Reich v. Priba Corp.*, 890 F. Supp. 586 (N.D. Tex. 1995) (dancers are employees); *Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343

(M.D. Fla. 1997) (dancers are employees); *Doe v. Cin-Lan, Inc.*, 08-CV-12719, 2008 WL 4960170 (E.D. Mich. Nov. 20, 2008) (dancer substantially likely to be able to prove she's an employee); *Morse v. Mer Corp.*, 1:08-CV-1389-WTL-JMS, 2010 WL 2346334 (S.D. Ind. June 4, 2010) (dancers are employees); *Clincy v. Galardi S. Enterprises, Inc.*, 808 F. Supp. 2d 1326, 1329 (N.D. Ga. 2011) (dancers are employees); *Thompson v. Linda And A., Inc.*, 779 F. Supp. 2d 139 (D.D.C. 2011) (dancers are employees); *Thornton v. Crazy Horse, Inc.*, 3:06-CV-00251-TMB, 2012 WL 2175753 (D. Alaska June 14, 2012) (dancers are employees); *Milano's, Inc. v. Kansas Dep't of Labor, Contributions Unit*, 293 P.3d 707 (Kan. 2013) (dancers are employees); *Hart v. Rick's Cabaret Int'l, Inc.*, 09 CIV. 3043 PAE, 2013 WL 4822199 (S.D.N.Y. Sept. 10, 2013), reconsideration denied (Nov. 18, 2013) (dancers are employees).

FLSA COLLECTIVE ACTION ALLEGATIONS

56. Plaintiff seeks to bring her claims under the FLSA on behalf of herself and all other similarly situated workers of Defendant who worked in any week as an independent contractor (or otherwise not classified as an employee) in three years immediately preceding the date on which this action was filed and continuing thereafter through the date on which final judgment is entered. Those who file a written consent will be a party to this action pursuant to 29 U.S.C. § 216(b). ("FLSA Class"). Plaintiff seeks unpaid minimum wages, unpaid overtime, liquidated damages, court costs, and attorneys' fees on behalf of the FLSA Class.

57. Plaintiff has actual knowledge that Class Members have also been denied overtime pay for hours worked over forty hours per workweek and have been denied pay at the federally mandated minimum wage rate. That is, Plaintiff worked with other dancers at Defendant's establishments. As such, she has first-hand personal knowledge

of the same pay violations throughout Defendant's multiple establishments. Furthermore, other exotic dancers at Defendant's various establishments have shared with her similar pay violation experiences as those described in this complaint.

58. Other employees similarly situated to the Plaintiff work or have worked for Defendant's gentlemen's club, but were not paid overtime at the rate of one and one-half their regular rate when those hours exceeded forty hours per workweek. Furthermore, these same employees were denied pay at the federally mandated minimum wage rate.

59. Although Defendant permitted and/or required the Class Members to work in excess of forty hours per workweek, Defendant has denied them full compensation for their hours worked over forty. Defendant has also denied them full compensation at the federally mandated minimum wage rate.

60. The Class Members perform or have performed the same or similar work as the Plaintiff.

61. Class Members regularly work or have worked in excess of forty hours during a workweek.

62. Class Members are not exempt from receiving overtime and/or pay at the federally mandated minimum wage rate under the FLSA.

63. As such, Class Members are similar to Plaintiff in terms of job duties, pay structure, misclassification as independent contractors and/or the denial of overtime and minimum wage.

64. Defendant's failure to pay overtime compensation and hours worked at the minimum wage rate required by the FLSA results from generally applicable policies or practices, and does not depend on the personal circumstances of the Class Members.

65. The experiences of the Plaintiff, with respect to her pay, and lack thereof, is typical of the experiences of the Class Members.

66. The specific job titles or precise job responsibilities of each Class Member does not prevent collective treatment.

67. All Class Members, irrespective of their particular job requirements, are entitled to overtime compensation for hours worked in excess of forty during a workweek.

68. All Class Members, irrespective of their particular job requirements, are entitled to compensation for hours worked at the federally mandated minimum wage rate.

69. Although the exact amount of damages may vary among Class Members, the damages for the Class Members can be easily calculated by a simple formula. The claims of all Class Members arise from a common nucleus of facts. Liability is based on a systematic course of wrongful conduct by the Defendant that caused harm to all Class Members.

70. As such, the class of similarly situated Plaintiffs is properly defined as follows:

> **The Class Members are all of Defendant's current and former exotic dancers from any time starting three years before this Complaint was filed up to the present.**

NORTH CAROLINA WAGE AND HOUR ACT (NCWHA) CLASS ACTION ALLEGATIONS

71. Plaintiff also seeks to represent a class of individuals under Fed. R. Civ. P. 23(b)(3), for back wages and liquidated damages under N.C. Gen. Stat. §§ 95-25.6, 95-22.22, and 95-25.22(a1) ("NCWHA Class"). The NCWHA Class consists of all dancers at Defendant's club at any time in the two years prior to the initiation of this action

continuing through the present that did not receive their wages when those wages were due.

72. The individuals in the Class are so numerous that joinder of all individual members is impracticable. Although the precise number of such individuals is currently known but to Defendant, Plaintiff believes that the number of individuals that worked at Defendant's club as dancers in the last two years is well in excess of 40 dancers.

73. There are questions of law and fact common to the Class that predominate over any individual questions solely affect individual members, including, but not limited to:

A. Whether Defendant violated the FLSA or the NCWHA by classifying all its dancers as independent contractors as opposed to employees and not paying any wages;

B. Whether the monies given to dancers when they performed dances is properly classified as a gratuity or a service fee;

C. Whose property the monies given to dancers when they perform dances is;

D. Whether Defendants unlawfully required Class Members to split their tips with Defendant;

E. The amount of damages, restitution, and/or other relief (including all applicable civil penalties, liquidated damages, and injunctive/equitable relief) Plaintiff and Class Members are entitled to; and,

F. Whether Defendant should be permanently enjoined from continuing to misclassify, and in turn, refusing to pay minimum wages to the Class Members.

74. Plaintiff's claims are typical of those of the Class. Plaintiff, like other members of the Class, was misclassified as an independent contractor and denied her rights to wages and gratuities under the FLSA and the NCWHA. The misclassification of Plaintiff resulted from the implementation of a common business practice which affected

all Class Members in a similar way. Plaintiff challenges Defendant's practice under legal theories common to all Class Members.

75. Plaintiff and the undersigned counsel are adequate representatives of the Class. Given Plaintiff's loss, Plaintiff has the incentive and is committed to the prosecution of this action for the benefit of the Class. Plaintiff has no interests that are antagonistic to those of the Class or that would cause her to act adversely to the best interests of the Class. Plaintiff has retained counsel experienced in class action litigation and wage and hour disputes.

76. This action is maintainable as a class action under Fed. R. Civ. P. 23(b)(1), 23(b)(2), and 23(c)(4) because the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards for Defendant and similar companies.

77. This action is maintainable as a class action under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the Class predominate over any questions affecting only individuals members of the Class and because a class action is superior to other methods for the fair and efficient adjudication of this action.

FIRST CAUSE OF ACTION
Violation of the FLSA—Collective Action
(Failure to Pay the Statutory Minimum Wage and Overtime

78. Plaintiff incorporates all allegations contained in the foregoing paragraphs.

79. 29 U.S.C. § 216(b) allows Plaintiff to assert FLSA claims on behalf of herself an all other employees similarly situated. Plaintiff asserts this claim on behalf of herself an all similarly situated employees in the Class defined above, who worked for

Defendant at any time from the date three years prior to the date the Complaint was originally filed continuing through the present. All requirements for a collective action are met.

80. 29 U.S.C. § 206 requires Defendant pay all employees the minimum wage for all hours worked.

81. 29 U.S.C. § 207 requires Defendant pay all employees at a rate at least equal to one and one half times their regular rate for all hours worked in excess of forty hours per week.

82. Defendant failed to pay Plaintiff and the Class Members the minimum wage or overtime, or any wages whatsoever. In fact Defendant actually requires that Plaintiff and Class Members actually pay it in order to work.

83. Defendant failed to pay Plaintiff or any other dancer minimum wages throughout the relevant period because it misclassified them as independent contractors.

84. The amounts paid to Class Members by customers in relation to dances performed were tips, not wages or services fees. These monies were not the property of Defendant. The entire amounts collected from customers in relation to dances performed by Class Members were not made part of any Defendant's gross receipts at any point.

85. As a result, the amount paid by Plaintiff and Class Members in relation to dances were tips, not wages or service fees, and no part of those amounts can be used to offset Defendant's obligation to pay Class Members or Plaintiff the minimum wages due.

86. Further, no tip credit applies to reduce or offset any minimum wages due. The FLSA only permits an employer to allocate an employee's tips to satisfy a portion of the statutory minimum wage requirement provided that the following conditions are satisfied (1) the employer must inform the tipped employee of the provisions of 29

U.S.C. § 203(m); and (2) tipped employees must retain all the tips received except those tips included in a tip pool among employees who customarily and regularly receive tips.

87. Neither of these conditions is satisfied. Defendant did not inform Plaintiff or Class Members of the provision of 29 U.S.C. § 203(m) nor did Plaintiff and Class Members retain all of their tips. Instead, Defendant maintained that no dancer was ever due any minimum wages due to their classification as independent contractors. The dancers, in turn, were paid nothing.

88. Based on the foregoing, Plaintiff and the Class Members are entitled to the full statutory minimum wages and overtime as set forth in 29 U.S.C. §§ 206 and 207 for all periods in which they worked for Defendant.

89. Defendant's conduct in misclassifying dancers like Plaintiff and Class Members was willful and done to avoid paying them minimum wages, overtime, and other benefits that they were legally entitled to.

90. The FLSA provides that private civil action may be brought for the payment of federal minimum wages and overtime together with an equal amount in liquidated damages. Moreover, Plaintiff and Class Members are entitled to recover attorneys' fees and costs incurred in enforcing their rights pursuant to 29 U.S.C. § 216(b).

91. 29 U.S.C. § 211(c) provides in relevant part:

> Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

92. 29 C.F.R. § 516.2 further requires that every employer shall maintain and preserve payroll or other records containing, without limitation, the total hours worked by each employee each workday and total hours worked by each employee during the workweek.

93. To the extent Defendant failed to maintain all records required by the aforementioned statute and regulations, and failed to furnish to Plaintiff and the Class Members comprehensive statements showing the hours they worked during the relevant time period, it also violated the law.

94. When an employer fails to keep accurate records of hours worked by its employees, the rule in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 is controlling. That rule states:

> [W]here the employer's records are inaccurate or inadequate. . .an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer failed to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

95. The Supreme Court set forth the above standard to avoid allowing the employer to benefit by failing to maintain proper records. Where damages are awarded pursuant to the standard in *Mt. Clemens*, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with. . .the Act." *Id.*

96. Based on the foregoing, on behalf of the Class, Plaintiff seeks unpaid minimum wages and overtime at the required legal rates for all their work during the relevant time period, back pay, restitution, damages, reimbursement of any tip splits or tip sharing, liquidated damages, attorneys' fees and costs, and any other relief allowed by law.

SECOND CAUSE OF ACTION
Violation of the North Carolina Wage and Hour Act

97. Plaintiff incorporates all allegations contained in the foregoing paragraphs.

98. North Carolina law requires an employer to pay its employees on all wages and tips accruing to the employee. N.C. Gen. Stat. § 95-25.6.

99. Defendant was required to pay Plaintiffs and Class Members for all wages at North Carolina's minimum wage rate or the FLSA minimum wage rate, whichever results in a higher payment to Plaintiff and Class Members. N.C. Gen. Stat. § 95-25.3.

100. Defendant was also required to pay each employee that worked more than 40 hours per workweek at a rate of not less than time and one half of the regular rate of pay for each hour over 40 per week. N.C. Gen. Stat. § 95-25.4.

101. Defendant intentionally refused to pay all wages due as set forth in the preceding paragraphs to Plaintiff and Class Members in violation of the North Carolina Wage and Hour Act.

102. Accordingly, Plaintiff, on behalf of herself and the Class Members, seeks damages in the amount equal to the amount of unpaid earned compensation, liquidated damages, interests, costs, and attorneys' fees. N.C. Gen. Stat. § 95-25.22.

DAMAGES SOUGHT

103. Plaintiff and Class Members are entitled to recover compensation for the hours they worked for which they were not paid at the federally mandated minimum wage rate or the rate mandated by the NCWHA.

104. Additionally, Plaintiff and Class Members are entitled to recover their unpaid overtime compensation.

105. Plaintiff and Class Members are also entitled to all of the misappropriated tips.

106. Plaintiff and Class Members are also entitled to an amount equal to all of their unpaid wages as liquidated damages.

107. Plaintiff and Class Members are entitled to recover their attorney's fees and costs as required by the FLSA and the NCWHA.

JURY DEMAND

108. Plaintiff hereby demands trial by jury.

PRAYER

109. For these reasons, Plaintiff and Class Members respectfully request that judgment be entered in their favor awarding the following relief:

a. Overtime compensation for all hours worked over forty in a workweek at the applicable time-and-a-half rate;

b. All unpaid wages at the FLSA/NCWHA mandated minimum wage rate;

c. All misappropriated tips;

d. An equal amount of all owed wages as liquidated damages as allowed under the FLSA and NCWHA;

e. Reasonable attorney's fees, costs and expenses of this action as provided by the FLSA; and

f. Such other relief to which Plaintiff and Class Members may be entitled, at law or in equity.

Respectfully submitted,

KENNEDY HODGES, L.L.P.

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JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Leslie Holden

(b) County of Residence of First Listed Plaintiff Cobb County, Georgia
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Todd R. Ellis, Law Office of Todd Ellis, P.A.
7911 Broad River Road, Suite 100
803-732-0123

DEFENDANTS
Raleigh Restaurant Concepts, Inc.

County of Residence of First Listed Defendant Wake County, N.C.
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☒ 4
Citizen of Another State	☒ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 625 Drug Related Seizure of Property 21 USC 881	☐ 422 Appeal 28 USC 158	☐ 375 False Claims Act
☐ 120 Marine	☐ 310 Airplane	☐ 365 Personal Injury – Product Liability	☐ 690 Other	☐ 423 Withdrawal 28 USC 157	☐ 400 State Reapportionment
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability		PROPERTY RIGHTS	☐ 410 Antitrust
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability		☐ 820 Copyrights	☐ 430 Banks and Banking
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY		☐ 830 Patent	☐ 450 Commerce
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud		☐ 840 Trademark	☐ 460 Deportation
☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	LABOR	SOCIAL SECURITY	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☒ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 480 Consumer Credit
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	☐ 720 Labor/Management Relations	☐ 862 Black Lung (923)	☐ 490 Cable/Sat TV
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 740 Railway Labor Act	☐ 863 DIWC/DIWW (405(g))	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability	☐ 362 Personal Injury – Medical Malpractice		☐ 751 Family and Medical Leave Act	☐ 864 SSID Title XVI	☐ 890 Other Statutory Actions
☐ 196 Franchise			☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 891 Agricultural Acts
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 791 Employee Retirement Income Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 210 Land Condemnation	☐ 440 Other Civil Rights	Habeas Corpus	IMMIGRATION	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 895 Freedom of Information Act
☐ 220 Foreclosure	☐ 441 Voting	☐ 463 Alien Detainee	☐ 462 Naturalization Application	☐ 871 IRS—Third Party 26 USC 7609	☐ 896 Arbitration
☐ 230 Rent Lease & Ejectment	☐ 442 Employment	☐ 510 Motions to Vacate Sentence	☐ 465 Other Immigration Actions		☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
☐ 240 Torts to Land	☐ 443 Housing/ Accommodations	☐ 530 General			☐ 950 Constitutionality of State Statutes
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities – Employment	☐ 535 Death Penalty			
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities – Other	Other			
	☐ 448 Education	☐ 540 Mandamus & Other			
		☐ 550 Civil Rights			
		☐ 555 Prison Condition			
		☐ 560 Civil Detainee – Conditions of Confinement			

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
NC 95-25.1 and 29 U.S.C. 216(b)
Brief description of cause:
Failure to pay federal and state minimum wage and overtime standards.

VII. REQUESTED IN COMPLAINT:
☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:
JUDGE DOCKET NUMBER

DATE 6/13/2014
SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

JS 44 Reverse (Rev. 12/12)

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; NOTE: federal question actions take precedence over diversity cases.)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity. Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Leslie Holden

Plaintiff(s)

v.

Raleigh Restaurant Concepts, Inc.

Defendant(s)

Civil Action No. 5:14-cv-00348

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* CT Corporation System
Registered Agent of Raleigh Restaurant Concepts, Inc.
150 Fayetteville St., Box 1011
Raleigh, North Carolina 27601-2957

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Law Office of Todd Ellis, P.A.
7911 Broad River Road, Suite 100, Irmo, South Carolina 29063

Kennedy Hodges, LLP
711 W. Alabama Street, Houston, Texas 77006

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 5:14-cv-00348

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
IN THE WESTERN DIVISION

LESLIE HOLDEN on Behalf of Herself and on Behalf of All Others Similarly Situated,	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO. 5:14-cv-00348**
RALEIGH RESTAURANT CONCEPTS, INC.,	§	
Defendant.	§	

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

PURSUANT TO FED. R. CIV. P. 7.1 AND LOCAL CIVIL RULE 7.3, OR FED. R. CRIM. P. 12.4 AND LOCAL CRIMINAL RULE 12.3,

Leslie Holden on Behalf of Herself and on Behalf of All Others Similarly Situated is the Plaintiff makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

   No.

2. Does party have any parent corporations?

   No.

3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity?

   No.

4. Is there any other publicity held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Civil Rule 7.3 or Local Criminal Rule 12.3)?

   No.

5. Is party a trade association?

   No.

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of creditor's committee:

   Not applicable.

Respectfully submitted,

KENNEDY HODGES, L.L.P.

By: /s/ David W. Hodges

David W. Hodges
dhodges@kennedyhodges.com
Fed I.D. # 20460
Texas State Bar No. 00796765 (will apply for admission *pro hac vice*)
711 W. Alabama St.
Houston, TX 77006
Telephone: (713) 523-0001
Facsimile: (713) 523-1116

LEAD ATTORNEY IN CHARGE FOR PLAINTIFF & CLASS MEMBERS

Of Counsel:
John A. Neuman
jneuman@kennedyhodges.com
Texas State Bar No. 24083560 (will apply for admission *pro hac vice*)
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711 W. Alabama St.
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LOCAL COUNSEL:

/s/ Todd Ellis

Todd Ellis (Fed. I.D. # 22039)
LAW OFFICE OF TODD ELLIS, P.A.
7911Broad River Road, Suite 100
Irmo, SC 29063
Phone: 803-732-0123
Fax: 803-732-0124
Email: todd@toddellislaw.com

CONSENT TO BECOME A PARTY PLAINTIFF

Name: Leslie Holden

1. I consent and agree to pursue my claims of unpaid overtime and/or minimum wage through the lawsuit filed against my employer.

2. I understand that this lawsuit is brought to recover unpaid wages under the Fair Labor Standards Act and/or any applicable state laws. I hereby consent, agree and opt-in to become a plaintiff herein and be bound by any judgment by the Court or any settlement of this action.

3. I intend to pursue my claim individually, unless and until the court certifies this case as a collective or class action. I agree to serve as the class representative if the court approves. If someone else serves as the class representative, then I designate the class representatives as my agents to make decisions on my behalf concerning the litigation, the method and manner of conducting the litigation, the entering of an agreement with the plaintiffs' counsel concerning attorney's fees and costs, and all other matters pertaining to this lawsuit.

4. In the event the case is certified and then decertified, I authorize Plaintiffs' counsel to use this Consent Form to re-file my claims in a separate or related action against my employer.

(Signature) Leslie Holden (Date Signed) 7/11/2013

Exhibit A

Exhibit 2

EDWARD M. CHEROF
Direct Dial: 404-586-1851
Email Address: cherofe@jacksonlewis.com

April 2, 2015

VIA ELECTRONIC FILING

Ashley L. Banks, Field Attorney
National Labor Relations Board
Sub Region 11
4035 University Pkwy Ste 200
Winston Salem, NC 27106-3275

RE: Raleigh Restaurant Concepts, Inc. d/b/a
The Men's Club of Raleigh
NLRB Case 10-CA-145882

Dear Ms. Banks:

This is the statement of position of Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh ("The Men's Club," the "Company" or the "Charged Party") in the above-captioned matter.

This statement is a summary only and the Board should not consider it a complete statement of all facts which relate to this matter. It responds only to specific allegations contained in the Charge and your letter. Please keep in mind that this statement is based on the best information available at this time, and we reserve our right to supplement or modify it if we discover additional information while this matter is pending before the Board.

The Charge, filed by Leslie Holden ("Charging Party"), alleges that since on or about August 12, 2014, the Company sought to enforce a waiver of the right to mediate and arbitrate employment disputes on a collective basis in violation of Section 7 of the National Labor Relations Act ("NLRB", the "Act"), and the Board decisions in *D.R. Horton*, 257 NLRB No. 184 (January 2012), and *Murphy USA, Inc.*, 361 NLRB No. 72 (October 2014).

The Charge should be dismissed on several grounds. First, and as a threshold matter, Charging Party was not an employee of the Company, and therefore is excluded from the protections of the Act. Second, *assuming arguendo* that Ms. Holden is an employee, which she is not, the Board's holding in *D.R. Horton* and restated in *Murphy Oil USA, Inc.* has been rejected by every Circuit Court that has considered it, and is contrary to Supreme Court precedent.

A. BACKGROUND

1. The Men's Club of Raleigh

The Men's Club of Raleigh is a retail business operating at 3210 Yonkers Road, Raleigh, North Carolina. The Company sells food and beverages (both alcoholic and non-alcoholic) in the Club.

The interior of the Club consists of services areas, each of which includes a bar and tables. In addition to the bars, there are dedicated "stages" and private rooms where female entertainers perform nude or semi-nude dancing.

The Club also features a large commercial kitchen. The kitchen supports a menu available any time the Club is open. In addition to the bars, service areas and the kitchen, the Club also contains administrative areas, and dressing rooms. In order to sell food and beverages, the Club has to secure licensing from the State of North Carolina. If the Club does not meet the State's requirements, its licenses can be revoked.

2. Staffing at the Club

The Club operates seven days a week. A manager is on duty when the Club is open and is responsible for its operations. The Club employs bartenders, wait staff, bar backs, managers and security personnel.

In addition to the employees, female entertainers perform at the Club under contract. Charging Party was one of the female entertainers who sporadically performed at the Club. As set forth below, entertainers are not employees of the Company.

3. The Role of Entertainers in the Retail Business

Entertainers at The Men's Club contract to dance semi-nude or nude. This provides a draw to attract customers to the Club. The presence of entertainers distinguishes the Company from other bars and restaurants. It is a unique characteristic and appeals to many customers who then come into the Club and buy food and drink.

The use of entertainers at the Club is known as a "draw item", which is common in the retail business. A common draw in the food and restaurant business is to feature live music. A popular musical performer can bring customers to a bar or club where the customers then spend money on food and alcohol. Entertainers serve the same purpose.

4. Entertainers Perform Under Contract with the Club as Tenants, Not Employees

Entertainers at the Club have no employment relationship with the Company. Rather, they perform pursuant to a contract between each dancer and the Club, as landlord and tenant. The contract takes the form of an Entertainment Lease.

The Lease satisfies the legal requirements of a contract and is common in the industry. The Lease as used at the Club, or one identical in all relevant aspects, has been in place since about 2008. Entertainment Leases expire yearly, or earlier if the entertainer does not perform for two consecutive months.

Ms. Holden signed the Entertainment Lease on March 22, 2012 and again on January 22, 2013. *See Attachment 1, for a copy of the lease signed by Charging Party.* The Lease she entered into establishes an independent contractor relationship in all respects:

- The Club agrees to provide the entertainer with an environment in which to dance. The Club is required to provide a stage area and other areas in which the dancer can perform, as well as music for use on the premises, lighting, and dressing room facilities. In exchange, the entertainer pays the Club a rental fee. The rental fee is set forth in the entertainment lease, based on the number and the type of performance, not on the time spent performing. *See Attachment 1, p. 1.*

- The Club does not pay the entertainer for her services, the customer does. Entertainers are paid charges directly from customers in return for dancing. The charge depends on the nature and length of the dance. Performers also receive tips from customers. *See Attachment 1, p. 2.*

- As such, the lease provides that the entertainer agrees to "be exclusively responsible for, and shall pay, all federal, state and local taxes and contributions imposed upon any income earned by entertainer while performing on the premises...." *See Attachment 1. Page 3.*

- There are virtually no restrictions on the dancer beyond that she obey the law. The Club retains no control over how she performs as an entertainer. Indeed, the Lease provides, in Section 7: "The Club has no right to direct or control the nature, content, character, manner or means of Entertainer's 'entertainment services' or her performance." *See Attachment 1, page 2.*

- Nor are there any requirements by the Club that the entertainer dance for any particular customer. It is entirely up to the dancer to decide whether she will dance for a customer.

- Entertainers who perform at The Men's Club also perform at other clubs, including other clubs in the Raleigh area. In fact, some travel as far as Charlotte to work. The Lease contains an explicit non-exclusivity clause, which states: "By entering into this Lease,

entertainer is not limited to performing only on the Club's premises. Entertainer is free to perform her entertainment activities at other businesses and at other locations." *See Attachment 1, page 1.*

- The Company does not have the authority to demand or control attendance in the Club by entertainers, nor does it try to exercise such authority. By contract, the entertainers set their performance schedules subject only to available space. The Lease states, "Entertainer shall select, at least one week in advance any and all days that she desires to perform on the premises during the following week and the Club shall make the leased portion of the premises available to entertainer during those dates and time subject only to space availability". *See Attachment 1, p. 7.*

- Nor does the Company have the authority to discipline entertainers under the Lease. As with any sound contract, however, it does provide for termination and breach. If either party is in material breach it may terminate the contract within 24 hours' notice. *See Attachment 1, p. 3.*

In sum, entertainers are not subject to day-to-day control by the Company. The Lease acknowledges the parties' relationship clearly, as it states:

> *The parties acknowledge and represent that the business relationship created between the **Club** and Entertainer is that of landlord and tenant for the joint and non-exclusive leasing of the **Premises** (meaning that other entertainers are also leasing portions of the Premises at the same time), and that this relationship is a material (meaning significant) part of this Lease....*

See Attachment 1, p. 2.

Moreover, the practical application of the Lease is consistent with its language at the Men's Club. There is no evidence that the contract is any way a sham. In short, the terms of the lease control the relationship between entertainers and the Club.

5. The Mandatory Arbitration Provision and the Class Action Waiver

The Lease includes a section entitled, "Arbitration of Class and Collective Actions/Attorney Fees and Costs". *See Attachment 1, p. 5.* Under this provision, the Entertainer agrees that any and all controversies between the entertainer and the Club "shall be exclusively decided by binding arbitration". In addition, the Lease also includes a section entitled, "Class and Collective Action Waiver". *See Attachment 1, p. 6.* Under this provision, the Entertainer agrees that any and all claims and disputes between she and the Club will be brought individually, and that she will not seek class or collective action treatment.

On June 13, 2014, Ms. Holden filed a collective and class action, alleging that The Men's Club violated the Fair Labor Standards Act ("FLSA"). The Company filed a Motion to Dismiss and/or to Stay and to Compel Arbitration and a Motion to Dismiss all Class and Collective

Action Allegations, based on the clear language in the Entertainment Lease which Ms. Holden executed. On November 20, 2014, Judge James C. Fox, Senior United States District Judge, issued an Order which, *inter alia*, allowed the Company's motion to compel arbitration and stayed the civil court proceeding pending arbitration.

B. ARGUMENT

1. The Charging Party is Not an Employee Covered by the Act

Section 2(3) of the Act defines employee status and reads, in part: "The term "employee" shall not include...any individual having the status of independent contractor..." Thus, in any charge alleging an employee was subject to an unfair labor practice, establishing employee status is a threshold issue. It is axiomatic that independent contractors are not employees and thus are excluded from the protections of the Act. *St. Joseph New-Press*, 345 NLRB 474 (2005).

The Board has addressed how it will analyze independent contractor status issues in various decisions over the years. In *The Arizona Republic*, 349 NLRB 1040 (2007), the Board set out several factors which weigh in determining independent contractor status. These include:

- Lack of control by the supposed employer;
- The contractor providing the tools necessary to provide the work;
- Little company supervision;
- The parties intent;
- The contractor's work not being an integral part of the company's business
- The skill level of the work, and
- Whether the company performed similar work.

In evaluating independent contractor status, the Board also specifically takes into account the entrepreneurial discretion possessed or risk assumed by the individual. *American Guild of Variety Artists (Harrah's Club), 176 NLRB 580 (1969), remanded on other grounds, 446 F.2d 471 (9th Cir. 1971).*

a. Control

Applying the above-stated standards to the instant case demonstrates that Ms. Holden is an independent contractor, and not an employee of The Men's Club. As set forth above, the Club exercises *no control* over the entertainers' actions, and provides *little, if any, supervision.* The Club does not set schedules, nor does it determine when and how much entertainers wish to perform. In fact, the only "rules" to which an entertainer is subject is not to damage property, to act in a safe fashion and to not violate the law. Beyond this minimal prescription the dancer is on her own. In fact, the Club does not have any disciplinary authority over the entertainers.

b. Skills

Entertainers come to the Club as accomplished performers. They already *possess the skills* necessary to perform. Individuals may disagree as to the value of the performance, as individuals may also disagree as to the value of particular musical genres, but there is no question dancing is a distinct art, and one which requires stage presence, athleticism, knowledge of the audience and communication abilities. In short, these performances require a high level of skill.

c. The Parties' Intent

There is also no question the parties *intended to create* a landlord-tenant relationship, rather than an employer-employee relationship. By the very terms of the Lease, the entertainer is an independent contractor, and one who pays her own taxes, provides her own costumes, and chooses her own dance style. The language in the Lease explicitly states, more than once, that entertainers are not employees. It says:

> *The parties acknowledge and represent that the business relationship created between the club and entertainer is that of landlord and tenant for the joint and nonexclusive leasing of the premises...and that this lease shall not be interpreted as creating an employer/employee relationship.*

d. Entrepreneurial Control

Further, unlike employees, the entertainers have *entrepreneurial control* over their compensation. How much or how little money a dancer makes is completely within her control. They decide whether they wish to perform, which customers they decide to dance for, how many dances they perform, and when. Nor does the Club "pay" the entertainers in any way, nor do they receive any benefits that the Club employees receive.

e. Different Work

Finally, the entertainers and the Club are in *different businesses*. The Club is in the business of selling food and drink, and it contacts with entertainers as live entertainment to attract patrons. The entertainer, on the other hand, is in the business of performing. They do not have to perform in this particular venue. They are free to dance at an establishment which is different from, and in a different business than the Company. Moreover, none of the entertainers who perform at the Club are employees.

2. The Board Has Consistently Held That Individuals in the Entertainment Industry, Like Charging Party, are Independent Contractors

The Board has long held that individuals who control their own earning potential, who have complete control of their work schedules their day-to-day work, are independent contractors, and thus are not covered by the Act. For example, in *Pennsylvania Academy of the Fine Arts*, 343 NLRB 847, 847(2004), a labor organization sought to represent the models who

contracted with an arts school for art classes. Similar to the instant case, the models in that case signed contracts, chose how often and when they worked, were free to undertake other modeling jobs, were not subject to discipline and received pay by the job, not as a wage or by the hour. Further, the Board noted that the parties' contract, "explicitly reflects each participant's understanding that the models are independent contractors". The models were excluded from coverage under the Act.

In cases where performers or entertainers have control of their performances—as opposed to the Company's they contract with—the Board has consistently found independent contractor status. For instance, in *American Guild of Musical Artists*, 157 NLRB 735 (1966), the Board affirmed the trial examiner's decision that two ballet dancers were independent contractors where the company had little control or supervision as to how dancers danced roles in rehearsal or in actual performances, and, like the instant case, where the dancers supplied their own costumes.

In *Strand Art Theatre, Inc.*, 184 NLRB 667 (1970), the Board found that a husband and wife entertainment duo (the wife serving as an exotic dancer) were independent contractors because they controlled content of performances and were responsible for entertaining audiences. In that case, the theatre supplied only theatre stage, music, and lights. The Board took into account that the Charging Parties controlled "the manner and means" of performing work. The same is true in the instant case.

Similarly, in *Comedy Store*, 265 NLRB 1422 (1982), comedians were found to be independent contractors where they controlled their own content, order, and style of presentations and supplied their own props, costumes, and music. The club's owner sometimes made suggestions to comedians about performances but the suggestions were not always followed.

Finally, in *Children's Miracle Network*, 31-CA-25115 (Div. Advice Dec. 12, 2001), the Division of Advice found that musical acts for a telethon were independent contractors, where the musicians determined the songs to play, what order they should be played, the manner to perform them. The fact that the company provided stage and background equipment yielded to the fact that the musicians supplied their own instruments. Also, the musicians did not have to work exclusively for company and did not receive fringe benefits or workers' compensation benefits. Finally, like here, the musicians assumed entrepreneurial risk—in that case based on whether the lump sum fee they were paid exceeded their costs.

This authority buttresses the Company's assertion that the entertainers at The Men's Club are independent contractors, both by the explicit terms of their Lease, and by the manner in which the Club utilizes their services. In light of this overwhelming support, the Charge should be dismissed.

2. *Assuming Arguendo* that Entertainers are Employees, the Mandatory Arbitration Agreement and Class Action Waiver Is Lawful Under the Act

Even if one were to assume that Ms. Holden was an employee at The Men's Club, which she was not, the Company's decision to enforce an arbitration agreement and class action waiver in her case was not unlawful under Section 7 of the Act.

This is not a typical unfair labor practice case that can be decided in a vacuum of National Labor Relations Board ("Board" or "NLRB") precedent. Rather, it is a proceeding that brings into question the jurisdiction of the Board to act in a matter Congress has chosen to regulate through another statute, namely, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* Four recent decisions of the United States Supreme Court have established the broad preemptive sweep of the FAA. These decisions by the High Court mandate that arbitration agreements be enforced according to their terms, and they reject the application of other state and federal statutes to arbitration agreements in the absence of an express "congressional command" to override the FAA.

The NLRA does not override the FAA. The Supreme Court, as well as the Second, Fifth, Eighth, Ninth and Eleventh Circuits have explicitly or implicitly rejected the Board's position that class action waivers violate the Act. Indeed, the Fifth Circuit denied enforcement of the Board's decision in *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (2012). On October 28, 2014, the Board issued *Murphy Oil*, 361 NLRB No. 72 (2014), in which a bare majority with two dissents reaffirmed *D.R. Horton*. Like *D.R. Horton*, the rationale in *Murphy Oil* is flawed and is inconsistent with the mandate of the FAA. It should not be relied upon in this case.

The Board does not have jurisdiction to find The Men's Club Entertainment Lease, which includes a class action waiver, violates the Act. As noted by member Miscimarra in his *Murphy Oil* dissent, "nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how other courts or other agencies would adjudicate non-NLRA legal claims, whether as 'class actions,' 'collective actions,' the 'joinder of individual claims' or otherwise." *Id.* at 23.

In *American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)*, which was issued after the Board's decision in *D.R. Horton*, the Supreme Court held that a class action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *Id.* at 2309; *see alsoCompuCredit*, 132 S.Ct. 665 (2012), at 669 (also issued after the Board's decision in *D.R. Horton*). The Supreme Court has further held that a class action waiver is not invalidated by the so-called "effective vindication" doctrine, which originated as dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *American Express*, 133 S.Ct. at 2310.

Under *Concepcion, CompuCredit, Marmet Health Care Ctr. V. Brown, 133 S. Ct. 1201(2012)*, and *American Express*, the validity of the Company's Entertainment Lease and

arbitration mandate and class action waiver contained therein must be determined under the FAA, not under *D.R. Horton* or the NLRA. Rather, in construing the broad reach and preemptive effective of the FAA the Supreme Court has held:

- The FAA reflects an "emphatic Agreement in favor" of arbitration. Enacted in 1925, the FAA places arbitration agreements on the same footing as other contracts and declares that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law for the revocation of any contract." 9 U.S.C. § 2. The FAA "reflects an emphatic federal Agreement in favor" of arbitration. *KPMG, LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011)(internal citations omitted). As the Supreme Court has emphasized, arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 23 (1983), and are to be "rigorously enforced," *Perry v. Thomas*, 482 U.S. 483, 490 (1987)(internal citations omitted).

- Arbitration agreements, including those containing class action waivers, are enforceable in accordance with their terms. "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)(internal citations omitted). As such, courts are primarily charged with the responsibility to enforce arbitration agreements in accordance with their terms so as to give effect to the bargain of the parties. *See, e.g., CompuCredit*, 132 S.Ct. at 669 (The FAA "requires courts to enforce agreements to arbitrate according to their terms"); *Marmet*, 132 S.Ct. at 1203 (internal citations omitted) (The FAA "'requires courts to enforce the bargain of the parties to arbitrate'"). As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (The parties to an arbitration "may agree to limit the issues they choose to arbitrate," "may agree on [the] rules under which any arbitration will proceed," and "may specify *with whom* they choose to arbitrate their disputes")(internal citations omitted). Indeed, as the Supreme Court recently observed when holding that a state law requiring parties to submit to class arbitration was preempted by the FAA; a state law requiring parties, in contravention of their arbitration agreement, to "shift from bilateral arbitration to class-action arbitration" results in a "fundamental" change to their bargain and is "inconsistent with the FAA." *Concepcion*, 131 S.Ct. at 1748-1751 (internal citations omitted).

- Arbitration agreements involving federal statutory rights, including those containing class action waivers, are enforceable "unless Congress itself has evinced an intention," when enacting the statute, to "override" the FAA mandate by a clear "contrary congressional command." *American Express*, 133 S.Ct. at 2309; *Mitsubishi*, 473 U.S. at 627(internal citations omitted). The Supreme Court has consistently held that parties may agree to arbitrate claims

arising under federal statutes. *See, e.g., Mitsubishi, supra,* 473 U.S. at 627. As long as the arbitral forum affords the parties the opportunity to vindicate any statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate. *CompuCredit*, 132 S.Ct. at 671 ("So long as the *guarantee* [of a federal statute's civil liability provision]—*the guarantee of the legal power to impose liability*—is preserved," the parties remain free to enter into an agreement requiring the arbitration of their statutory rights). However, if, when enacting a federal statute, "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," then such statutory rights cannot be subjected to arbitration and the FAA's mandate to enforce arbitration agreements according to their terms is thereby overridden by a contrary congressional command. *Mitsubishi*, 473 U.S. at 628; *American Express*, 133 S.Ct. at 2309. "If Congress did intend to limit or prohibit [the] waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history'" or "from an inherent conflict between arbitration and the statute's underlying purpose." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), quoting *Mitsubishi*, 473 U.S. at 627, 632-637. However, any expression of congressional intent in this regard must be clear and unequivocal. *See, e.g., CompuCredit*, 132 S.Ct.at 673 (If a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms").

- Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements. The FAA encompasses employment arbitration agreements, including those containing class action waivers. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). As the Supreme Court affirmed in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991),where it enforced an arbitration agreement involving a claim arising under the Age Discrimination in Employment Act, the FAA requires such a result even if there may be "unequal bargaining power between employers and employees" and even if "the arbitration could not go forward as a class action." As to this latter point, the Supreme Court in *Gilmer* recognized that a class action, as set forth in the Federal Rules of Civil Procedure, is simply a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot "abridge, enlarge or modify any substantive right"—and can be, like the choice of a judicial forum, waived.

As these principles attest, the FAA recognizes the rights of parties, whether they are employers or employees, to enter into arbitration agreements, including the right to fashion the procedures under which an arbitration is to proceed. The FAA further mandates that arbitration agreements be enforced according to their terms unless there is a clear congressional command to the contrary. Indeed, there is nothing in the NLRA itself or its legislative history that would even suggest that Congress sought to "override" the FAA's mandate and preclude an employee

jackson lewis
Attorneys at Law

from waiving his or his procedural right to file a class action when agreeing to arbitrate employment-related claims.

The Board's holding in *D.R. Horton* and *Murphy Oil, Inc.* violates the mandate of the FAA that arbitration agreements – including those with class action waivers – be enforced according to their terms absent an explicit congressional mandate to the contrary. No such mandate exists here.

In sum, the Company requests that the Charge be dismissed due to the fact that Ms. Holden was never an employee of the Company. Even if the Board were to find that she was an employee, the Charge should be dismissed due to the fact that the Entertainment Lease did not violate Section 7 of the Act.

Very truly yours,

JACKSON LEWIS P.C.

Edward M. Cherof

EMC/jb

Attachment

Exhibit 3

RRC, INC. d/b/a THE MENS CLUB
ENTERTIANMENT LEASE

NOTICE: THIS IS A LEGAL CONTRACT. DO NOT SIGN IT UNLESS YOU UNDERSTAND ALL OF ITS TERMS. ANY NEGOTIATED CHANGES TO THIS CONTRACT SHOULD BE INITIALED BY BOTH PARTIES IN THE MARGINS DIRECTLY NEXT TO THE MODIFICATIONS. WE SUGGEST THAT BEFORE SIGNING THIS CONTRACT, YOU HAVE IT REVIEWED BY AN ATTORNEY, ACCOUNTANT, OR OTHER PERSON OF YOUR CHOICE.

This Entertainment Lease (referred to as "Lease") is entered into by the "Club" and "Entertainer" for the leasing of certain portions of the "Premises." The "Club," the "Entertainer," and the "Premises" are identified on the last page of this Lease.

PURPOSE OF LEASE:
The Club operates a bar on the Premises, and Entertainer, who is engaged in the independently established trade of professional exotic dance entertainment, desires to lease from the Club, jointly together with other similar entertainers and upon the terms contained in this Lease, the right to use certain areas of the Premises for activities related to the presentation of live semi-nude and/or nude dance entertainment to the adult public.

TERMS OF LEASE:
Club and Entertainer agree as follows:

1. Leasing of Premises. Entertainer leases from the Club the right during normal business hours to jointly, along with other entertainers, use the stage areas and certain other portions of the Premises designated by the Club for the performing of live semi-nude and/or nude dance entertainment (as permitted by law) and related activities, upon the terms and conditions contained in this Lease. This Lease begins today, and ends on the earlier of:

   A. January 31, 2014;

   B. A termination date as provided for in paragraph 18;

   Notwithstanding the foregoing, in the event that this Lease is not terminated as provided for in paragraph 18, and should the Entertainer continue to perform at the Club after January 31, 2014, without the execution of a new lease, then the terms of this Lease shall continue to govern such performance until such time as a new lease is executed between the Entertainer and the Club. Upon execution of a new lease this Lease shall terminate.

2. Club's Obligations. The Club shall:

   A. Provide to Entertainer, at the Club's expense, music for use on the Premises, lighting, and dressing room facilities;

   B. Pay any and all copyright fees due relative to the music used on the Premises; and

   C. Advertise the business in a commercially reasonable manner for the benefit of both Entertainer and the Club. This does not, however, prohibit Entertainer from advertising her services outside of the Club in any manner or fashion she so desires. Entertainer shall not, however, in any of her advertising, utilize the name, identity, trade dress, trademarks, service marks or "logos" of the Club, without having first obtained the written approval of the Club for such use.

3. Subleasing. This Lease is acknowledged to be personal in nature. This means that Entertainer has no right to sublease or to assign any of her rights or obligations in this Lease to any other person without either the express written consent of the Club or without at least twenty-four hours prior notice to the Club. However, if Entertainer is at any time unable to fulfill her contractual obligations, Entertainer has the right to substitute the services of any licensed (if legally required) entertainer who has also entered into an Entertainment Lease with the Club. Any such substitution shall not, however, relieve Entertainer of the rent, lost rent charge and/or contract damage obligations as contained in this Lease if her substitute entertainer fails to pay any of those fees due as a result of the substitute's lease obligations.

4. Non-Exclusivity. By entering into this Lease, Entertainer is not limited to performing only on the Club's Premises. Entertainer is free to perform her entertainment activities at other businesses and at other locations.

5. Use of Premises. Entertainer agrees to:

   A. Perform semi-nude ("topless") and/or nude dance entertainment (as permitted by law) at the Premises;

   B. At all times conduct herself as a professional entertainer;

   C. Obtain, keep in full force and effect, and have in her possession at all times while she is on the Premises and available for inspection as may be required by law, any and all required licenses and/or permits. Failure of Entertainer to have in her possession a required license and/or permit shall not relieve her of her rent obligations as provided for in this Lease;

   D. Not violate any federal, state, or local laws or

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governmental regulations. If Entertainer violates any such laws or regulations, she will be exclusively responsible for all legal fees, costs, and fines associated with any prosecutions. Entertainer acknowledges, understands and agrees that any conduct by her which is in violation of any such laws or regulations is beyond the scope of her authority pursuant to this Lease, and constitutes a breach of the terms of this Lease;

E. Maintain accurate daily records of all income, including tips, earned while performing on the Premises, in accordance with all federal, state, and local taxation laws;

F. Become knowledgeable of all federal, state, and local laws and governmental regulations that apply to Entertainer's conduct while on the Premises; and

G. Pay for any damages she causes to the Premises and/or to any of the Club's personal property, furniture, fixtures, inventory, stock and/or equipment.

6. Compliance with Rules. The Club shall have the right to impose such rules upon the use of the Premises by Entertainer as the Club deems necessary in order to ensure that:

A. No damage to the Club's property occurs;

B. The Premises are used in a safe fashion for the benefit of all entertainers, patrons, and others; and

C. No violations of the law occur.

Entertainer agrees to comply with all such rules.

7. Nature of Performances – Property Rights. The Club has no right to direct or control the nature, content, character, manner or means of Entertainer's entertainment services or of her performances. Entertainer agrees, however, to perform consistent with the industry standards of a professional exotic dance entertainer.

So long as the relationship between Entertainer and the Club is that of landlord and tenant, Entertainer shall own and retain all intellectual property rights of her entertainment performances, including but not limited to all copyrights and rights of publicity. All of these rights become the property of the Club, however, if the relationship is ever changed to that of employee and employer.

8. Costumes. Entertainer shall supply all of her own costumes and wearing apparel, which must comply with all applicable laws. The Club shall not control in any way the choice of costumes and/or wearing apparel made by Entertainer, although the Club expects Entertainer to appear at all times while clothed in apparel that is consistent with industry standards for a professional entertainer.

9. Nature of Business. Entertainer understands: 1) That the nature of the business operated at the Premises is that of adult entertainment; 2) that she will be subjected to partial and/or full nudity (primarily female) and explicit language; and 3) that she may be subjected to advances by customers, to depictions or portrayals of a sexual nature, and to similar types of behavior. Entertainer represents that she is not, and will not be, offended by such conduct, behavior, depictions, portrayals, and language, and that she assumes any and all risks associated with being subjected to these matters.

10. Privacy. Entertainer and Club acknowledge that privacy and personal safety are important concerns to Entertainer. Accordingly, the Club shall not knowingly disclose to any persons who are not associated with the Club, or to any governmental entity, department, or agency, either the legal name of the Entertainer, her address, or her telephone number, except upon prior written permission of the Entertainer or as may be required by law.

11. Entertainment Fees. In consultation with entertainers who lease space on the Premises, the Club shall establish a fixed fee for the price of certain performances engaged in on the Premises (referred to as "Entertainment Fees"). Entertainer agrees not to charge a customer less than the fixed price for any such performance unless the Entertainer notifies the Club in writing of any charges to her customers of a lower amount. In addition, nothing contained in this Lease shall limit Entertainer from receiving "tips" and/or gratuities over-and-above the established price for such performances.

THE PARTIES SPECIFICALLY ACKNOWLEDGE AND AGREE THAT ENTERTAINMENT FEES ARE NEITHER TIPS NOR GRATUITIES, BUT ARE, RATHER, MANDATORY CHARGES TO THE CUSTOMER AS THE PRICE FOR OBTAINING THE SERVICE OF A PERSONAL ENTERTAINMENT PERFORMANCE.

12. Business Relationship of Parties.

A. The parties acknowledge and represent that the business relationship created between the Club and Entertainer is that of landlord and tenant for the joint and non-exclusive leasing of the Premises (meaning that other entertainers are also leasing portions of the Premises at the same time), and that this relationship is a material (meaning significant) part of this Lease. THE PARTIES SPECIFICALLY DISAVOW ANY EMPLOYMENT

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RELATIONSHIP BETWEEN THEM, and agree that this Lease shall not be interpreted as creating an employer/employee relationship or any contract for employment. Entertainer acknowledges and represents that she is providing no services for or to the Club, and that the Club does not employ her in any capacity. ENTERTAINER UNDERSTANDS THAT THE CLUB WILL NOT PAY HER ANY HOURLY WAGE OR OVERTIME PAY, ADVANCE OR REIMBURSE HER FOR ANY BUSINESS RELATED EXPENSES, OR PROVIDE TO HER ANY OTHER EMPLOYEE-RELATED BENEFITS, AND THAT SHE IS NOT ENTITLED TO RECEIVE AND THE CLUB WILL NOT PROVIDE TO HER ANY WORKER'S COMPENSATION BENEFITS OR ANY UNEMPLOYMENT INSURANCE BENEFITS.

B. The Club and Entertainer acknowledge and represent that if the relationship between them was that of employer and employee, the Club would be required to collect, and would retain, all Entertainment Fees paid by customers to Entertainer -- ENTERTAINER SPECIFICALLY ACKNOWLEDGING THAT IN THE CIRCUMSTANCE OF AN EMPLOYER/EMPLOYEE RELATIONSHIP, ALL ENTERTAINMENT FEES WOULD, BOTH CONTRACTUALLY AND AS A MATTER OF LAW, BE THE PROPERTY OF THE CLUB AND WOULD NOT BE THE PROPERTY OF THE ENTERTAINER. THE PARTIES ACKNOWLEDGE AND REPRESENT THAT ENTERTAINER'S RIGHT TO OBTAIN AND KEEP ENTERTAINMENT FEES PURSUANT TO THIS LEASE IS SPECIFICALLY CONTINGENT AND CONDITIONED UPON THE BUSINESS RELATIONSHIP OF THE PARTIES BEING THAT OF LANDLORD AND TENANT.

Under an employment relationship, Entertainer would be paid on an hourly basis at a rate equal to the applicable minimum wage, reduced by any maximum "tip credit" as may be allowed by law. Pursuant to Federal law under United States Code Section 203 (m) and in accordance with North Carolina statutes, an employer may reduce minimum wage payments down to, at the time this Agreement has been prepared, $2.13 per hour as long as the tips of the employee bring the hourly income of the individual up to at least the full minimum wage rate. Entertainer would further be entitled to retain "tips" and/or gratuities -- *but not* Entertainment Fees -- that she may collect while performing on the Premises.

The parties additionally acknowledge and represent that were the relationship between them to be that of employer and employee, Entertainer's employment would be "at will" (meaning Entertainer could be fired at any time without cause and without prior notice or warning), and that the Club would be entitled to control, among other things, Entertainer's: Work schedule and the hours of work; job responsibilities; physical presentation (such as make-up, hairstyle, etc.); costumes and other wearing apparel; work habits; the selection of her customers; the nature, content, character, manner and means of her performances; and her ability to perform at other locations and for other businesses. Entertainer hereby represents that she desires to be able to make the choices of all of these matters herself and without the control of the Club, and the Club and Entertainer agree by the terms of this Lease that all such decisions are exclusively reserved to the control of Entertainer.

ENTERTAINER FURTHER SPECIFICALLY REPRESENTS THAT SHE DOES NOT DESIRE TO PERFORM AS AN EMPLOYEE OF THE CLUB SUBJECT TO THE EMPLOYMENT TERMS AND CONDITIONS OUTLINED IN THIS SUB-PARAGRAPH 12B, BUT, RATHER, DESIRES TO PERFORM AS A TENANT CONSISTENT WITH THE OTHER PROVISIONS OF THIS LEASE.

C. If any court, tribunal, arbitrator, or governmental agency determines, or if Entertainer at any time contends, claims, or asserts, that the relationship between the parties is something other than that of landlord/tenant and that Entertainer is then entitled to the payment of wages from the Club, all of the following shall apply:

i. All Entertainment Fees received by Entertainer at any time she performed at the Club shall be deemed the income and property of the Club;

ii. In order to comply with applicable tax laws and to assure that the Club is not unjustly harmed and that Entertainer is not unjustly enriched by the parties having financially operated pursuant to the terms of this Lease, the Club and Entertainer agree that Entertainer shall surrender, reimburse and pay to the Club, all Entertainment Fees received by Entertainer at any time she performed on the Premises - all of which would otherwise have been collected and kept by the Club had they not been retained by Entertainer under the terms of this Lease - and

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shall immediately provide a full accounting to the Club of all tip income which she received during that time;

iii. Any Entertainment Fees that Entertainer refuses to return to the Club shall be deemed service charges to the customer and shall be accounted for by the Club as such. The Club shall then be entitled to full wage credit for all Entertainment Fees retained by Entertainer, and such withheld fees shall therefore constitute wages paid from the Club to Entertainer. In the event that Entertainer refuses to return Entertainment Fees to the Club, the Club shall immediately submit to the IRS and applicable state taxing authorities all necessary filings regarding such income consistent with this subparagraph 12(C)(iii); and

iv. The relationship of the parties shall immediately convert to an arrangement of employer and employee upon the terms as set forth in subparagraph 12B.

D. If at any time Entertainer believes that, irrespective of the terms of this Lease, she is being treated as an employee by the Club or that her relationship with the Club is truly that of an employee, Entertainer shall immediately, but in no event later than three business days thereafter, provide notice to the Club in writing of her demand to be fully treated as an employee consistent with the terms of the paragraph 12(B) of this Lease and applicable law, and shall also within the same time period begin reporting all of her tip income to the Club on a daily basis; such tip reporting being required of all tipped employees of the Club under the terms of the Internal Revenue Code.

13. Taxes. ENTERTAINER SHALL BE EXCLUSIVELY OBLIGATED TO PAY ALL FEDERAL AND STATE INCOME TAX ON ANY MONIES EARNED PURSUANT TO THE CONTRACTUAL RELATIONSHIP.

14. Scheduling Showtimes. Entertainer shall select, at least one week in advance, any and all days that she desires to perform on the Premises during the following week, and the Club shall make the leased portion of the Premises available to Entertainer during those dates and times, subject only to space availability. Should Entertainer desire not to perform on the Premises at all during any given week, Entertainer shall give the Club notice of this at least one week in advance. Once scheduled, neither Entertainer nor the Club shall have the right to cancel or change any scheduled performance dates except as may be agreed to by Entertainer and the Club. For each day that Entertainer schedules herself to perform, Entertainer agrees to be on the Premises, available to perform, for a minimum of six (6) consecutive hours (one "showtime"). During those weeks that Entertainer desires to perform, Entertainer agrees to lease space at the Premises for a minimum of five (5) showtimes per week. Entertainer may be permitted to lease space on the Premises on days when she has not scheduled herself to perform, subject to space availability and director approval.

If Entertainer misses an entire scheduled showtime, Entertainer shall pay the rent due for that showtime to the Club no later than by the end of her next showtime. All lost rent charges and contract damages are established in view of the fact that it would be difficult to determine the exact actual lost rent or damage incurred as a result of certain breaches of the terms of this Lease.

15. Rent.

A. Flat Rent. Entertainer agrees to pay rent to the Club in accordance with the schedule attached as Exhibit "A" (referred to as "rent"). All flat rent shall be paid immediately prior to the beginning of the showtime.

B. Percentage Rent. Entertainer agrees to pay rent to the Club in accordance with the schedule attached as Exhibit "A" (referred to as "rent"). All percentage rent shall be paid by Entertainer to the Club immediately upon completion of the showtime.

16. Material Breach by Club. The Club materially (meaning significantly) breaches this Lease by:

A. Failing to provide Entertainer the leased portion of the Premises on any day as scheduled by Entertainer;

B. Failing to maintain any and all required licenses and/or permits;

C. Failing to maintain in full force any and all leases and subleases with the owner of the Premises;

D. Failing to maintain in full force all utilities services for the Premises;

E. Willfully violating any federal, state, or local law or regulation in regard to the operation of the Club; or

F. Violating any public health or safety rules or concerns.

The Club shall not be liable for any material breach as set forth in this paragraph 16 due to acts of God or to any other cause beyond the reasonable control of the Club.

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17. Material Breach by Entertainer. Entertainer materially (meaning significantly) breaches this Lease by:

A. Failing to maintain any and all required licenses and/or permits;

B. Willfully violating any federal, state, or local law or regulation while on the Premises;

C. Failing to have governmental issued photo identification on her persons at all times while on the Premises;

D. Failing to appear for a scheduled showtime on two or more occasions in any one calendar month;

E. Failing to timely commence her showtime on two or more occasions in a calendar week;

F. Failing to pay any rent or additional rent when due;

G. Failing to timely pay any assessed lost rent charges or contract damages;

H. Claiming the business relationship with the Club as being other than that of a landlord and tenant, contrary to paragraph 12A of this Lease; or

I. Violating any public health or safety rules or concerns.

18. Termination/Breach. Either party may terminate this Lease, without cause, upon thirty (30) days notice to the other party. Upon material (significant) breach, the non-breaching party may terminate this Lease upon twenty-four (24) hours notice to the other party, or as otherwise provided by law. Nothing in this paragraph, however, shall allow Entertainer to perform on the Premises without a valid license or permit (if applicable) and photo identification, or to continue to engage in conduct in violation of any laws, regulations, or public health or safety rules or concerns.

19. Severability. In the event that any term, paragraph, subparagraph, or portion of this Lease is declared to be illegal or unenforceable, this Lease shall, to the extent possible, be interpreted as if that provision was not a part of this Lease; it being the intent of the parties that any illegal or unenforceable portion of this Lease, to the extent possible, be severable from this Lease as a whole. Nevertheless, in the circumstance of a judicial, arbitration, or administrative determination that the business relationship between Entertainer and the Club is that of employer and employee, the relationship between Entertainer and the Club shall be governed by the provisions of subparagraphs 12B and 12C of this Lease.

20. Governing Law. This Lease shall be interpreted pursuant to the laws of the State of North Carolina.

21. Arbitration/Waiver of Class and Collective Actions/Attorney Fees and Costs.

A. Binding Arbitration. **ANY AND ALL CONTROVERSIES BETWEEN THE ENTERTAINER AND CLUB, REGARDLESS OF WHETHER SUCH CLAIMS SOUND IN CONTRACT, TORT, AND/OR ARE BASED UPON A FEDERAL, STATE OR LOCAL STATUTE, REGULATION OR CODE, SHALL BE EXCLUSIVELY DECIDED BY BINDING ARBITRATION HELD PURSUANT TO AND IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT ("FAA"), AND SHALL BE DECIDED BY A SINGLE NEUTRAL ARBITRATOR AGREED UPON BY THE PARTIES, WHO SHALL BE PERMITTED TO AWARD, SUBJECT ONLY TO THE RESTRICTIONS CONTAINED IN THIS PARAGRAPH 21, ANY RELIEF AVAILABLE IN A COURT. ALL PARTIES TO THIS AGREEMENT WAIVE THEIR RIGHT TO LITIGATE SUCH CONTROVERSIES, DISPUTES, OR CLAIMS IN A COURT OF LAW AND WAIVE THE RIGHT TO TRIAL BY JURY.**

In the event that the parties are unable to mutually agree upon an arbitrator, either party may apply to the American Arbitration Association ("AAA") for the selection of an arbitrator. Any arbitration shall be conducted consistent with the rules of the AAA, except as expressly or implicitly modified by this agreement. In the event that the dispute relates to an employment related claim, the AAA Employment Rules shall apply to the arbitration. All other disputes shall be governed by the AAA Commercial Rules.

In arbitration, all parties shall have the right to be represented by legal counsel, the arbitrator shall permit *only* that discovery which is necessary to prosecute/defend the claim then pending before the arbitrator and all aspects of the arbitration, including discovery, shall be confidential and shall only be used and/or disclosed in relationship to the then pending proceeding. In arbitration, the parties shall have the right to subpoena witnesses (in accordance with the procedures available in arbitration) to compel their attendance at hearing and to cross-examine witnesses, the proceedings shall be conducted in accordance with the requirements of due process required of arbitrations, and the arbitrator's decision shall be in writing and shall contain findings of fact and conclusions of law. The arbitrator's decision shall be final, subject only to review under standards set forth in the FAA. For any claims based upon a employment related statute, such as the Fair Labor Standards Act or other similar federal or state statute, the

Initials [redacted]

club shall pay all fees charged by AAA and the arbitrator that the Entertainer would not have had to pay in a court proceeding.

B. Costs and Fees. Any judgment, order, or ruling arising out of a dispute between the parties shall, to the extent permitted by applicable law, award costs incurred for the proceedings and reasonable attorney fees to the prevailing party. This provision shall not, however, apply to employment related claims prosecuted under a federal or state statute which provides for the award of fees and costs. In such circumstances, the federal or state statue shall govern the award of fees and/or costs for the statutory claims and this provision shall only govern the award of fees and costs related to any non-statutory claims. Notwithstanding the forging, nothing shall restrict the arbitrator from awarding the Club costs and/or attorney fees in the event that the arbitrator determines that an employment related claim is frivolous, pursued in bad faith, and/or conducted in a manner which multiplies the proceedings unreasonably and/or vexatiously

C. Class and Collective Action Waiver. ENTERTAINER AGREES THAT ANY AND ALL CLAIMS OR DISPUTES BETWEEN THE ENTERTAINER AND THE CLUB (AND ANY OTHER PERSONS OR ENTITIES ASSOCIATED WITH THE CLUB) WILL BE BROUGHT INDIVIDUALLY; THAT ENTERTAINER WILL NOT CONSOLIDATE HER CLAIMS WITH THE CLAIMS OF ANY OTHER INDIVIDUAL; THAT SHE WILL NOT SEEK CLASS OR COLLECTIVE ACTION TREATMENT FOR ANY CLAIM THAT SHE MAY HAVE; THAT SHE WILL NOT PARTICIPATE IN ANY CLASS OR COLLECTIVE ACTION AGAINST THE CLUB OR AGAINST ANY PERSONS OR ENTITIES ASSOCIATED WITH THE CLUB. IF AT ANY TIME ENTERTAINER IS MADE A MEMBER OF A CLASS IN ANY PROCEEDING, SHE WILL "OPT OUT" AT THE FIRST OPPORTUNITY, AND SHOULD ANY THIRD PARTY PURSUE ANY CLAIMS ON HER BEHALF, ENTERTAINER SHALL WAIVE HER RIGHTS TO ANY SUCH MONETARY RECOVERY. IN OTHER WORDS THE ENTERTAINER EXPRESSLY WAIVES HER RIGHT TO PROSECUTE, PARTICIPATE IN, OR PURSUE A CLASS OR COLLECTIVE ACTION AND/OR OTHER JOINT PROCEEDING AGAINST THE CLUB. THIS PARAGRAPH SHALL SURVIVE ANY JUDICIAL DETERMINATION THAT THE ARBITRATION AGREEMENT CONTAINED HEREIN IS UNENFORCEABLE FOR ANY REASON.

D. Survival. All provisions and subparagraphs of this paragraph 21 shall survive termination of this agreement.

BECAUSE OF LEGAL RESTRICTIONS, THE CLUB WILL NOT ENTER INTO A LEASE WITH AN ENTERTAINER WHO IS UNDER THE AGE OF 18 / 21 (circle one), AND THIS LEASE IS NULL AND VOID IF ENTERTAINER IS NOT OF SUCH AGE. ENTERTAINER SPECIFICALLY REPRESENTS THAT SHE IS OF THIS LAWFUL AGE OR OLDER, THAT SHE HAS PROVIDED -- OR WILL PROVIDE UPON REQUEST -- APPROPRIATE IDENTIFICATION VERIFYING HER AGE, AND THAT SUCH IDENTIFICATION IS VALID AND AUTHENTIC. ENTERTAINER ALSO REPRESENTS THAT SHE IS LAWFULLY ENTITLED TO WORK AND/OR PERFORM IN THE UNITED STATES.

BY SIGNING THIS DOCUMENT, ENTERTAINER REPRESENTS THAT SHE HAS RECEIVED A COPY OF, AND HAS FULLY READ, THIS LEASE; THAT SHE UNDERSTANDS, AND AGREES TO BE BOUND BY, ALL OF ITS TERMS; AND THAT SHE HAS BEEN PERMITTED TO ASK QUESTIONS REGARDING ITS CONTENTS AND HAS BEEN GIVEN THE OPPORTUNITY TO HAVE IT REVIEWED BY PERSONS OF HER CHOICE, INCLUDING ATTORNEYS AND ACCOUNTANTS.

THIS LEASE IS NOT BINDING UNTIL SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE CLUB.

Initials [redacted]

"CLUB"

RRC, INC. d/b/a/ THE MENS CLUB

By: [signature]

H H DEARING
PO BOX 41286
RALEIGH NC 27629-1286

[printed name]

Its: Dr Gyms
[position]

"PREMISES" 3210 Yonkers Road
[Club address]

Raleigh, NC 27604-3654
[City, state, zip code]

DATE: 1-22-13

"ENTERTAINER"

[signature]

[printed name]

Almond
[stage name]

[redacted]
[phone number]

[redacted]
[address]

Raleigh NC 27610
[City, state, zip code]

[Entertainer's license/permit number – if applicable]

RRC d/b/a THE MENS CLUB, RALEIGH, NC
EXHIBIT A TO LEASE AGREEMENT
(Amendments and Modifications)

The parties acknowledge and agree that the following terms are incorporated into the Lease Agreement:

1. Pursuant to paragraph 15 (A) of the lease agreement, the parties agree that the Flat Rent fee shall be as follows:

NUMBER OF SHOWTIMES WORKED PREVIOUS WEEK:
(SHOWTIMES IN THIS SECTION REFERRED TO AS ST's)

SHOWTIMES:	**5 OR MORE ST's**	**4 ST's**	**3 ST's**
11:30AM to 7:00PM Showtime			
Before 11:30 AM	FREE	$15.00	$30.00
Before 12:30 PM	$20.00	$35.00	$50.00
Before 1:30 PM	$35.00	$50.00	$65.00

*No 11:30AM-7:00PM Entertainer shall be allowed to start after 1:30 PM

7:00PM to 2:00AM Showtime			
Before 7:00P-2:00A	FREE	$45.00	$60.00
Before 8:00P-2:00A	$30.00	$75.00	$90.00
Before 9:00P-2:00A	$45.00	$90.00	$105.00

*No 7:00PM-2:00AM Entertainer shall be allowed to start after 9:00 PM

10:00PM to 5:00AM Showtime			
Before 10:00 PM	FREE	$45.00	$60.00
Before 11:00 PM	$30.00	$75.00	$90.00

*No 10:00PM-5:00AM Entertainer shall be allowed to start after 11:00 PM

* = At the discretion of the Director on Duty

In order to be Eligible for FREE rent, Entertainer must have worked 5 Showtimes during the previous week from the start of the Showtime until the end of the Showtime. (i.e.: 11:30AM to 7:00PM or, 7:00PM to 2:00AM or, 10:00PM to 5:00AM)

During special events, the Flat Rent charged by the club may be increased by the Club.

2. Pursuant to paragraph 15(b) of the lease agreement, the percentage rent shall be split between the Club and the Entertainer for the following types of personal dances:

Suites: The rental fee for suites shall be $200.00 for one quarter hour. The parties agree that the Suite Rental fee shall be split between the Club and the Entertainer as follows: $75.00 to Club, $125.00 to Entertainer. For one half hour suites the rental fee is $400.00; and the split between the Club and the Entertainer shall be $150.00 to the Club and $250.00 to the Entertainer. For one hour suites the rental fee is $800.00; and the split between the Club and the Entertainer shall be $300.00 to the Club and $500.00 to the Entertainer. Suite Rental Fees must be paid in advance.
Personal Dances: The Entertainer agrees to pay, as percentage rent, $15.00 for each dance performed in either personal dance room.

3. The Entertainer and the Club agree that the start of a "Showtime" shall be the time that the Entertainer reports to the DJ/EmCee ready to be placed on the entertainer rotation or to be immediately called to stage, regardless of the time that the entertainer arrived on the Club's premises.

4. The Entertainer agrees that all personal dances will be performed in one of the Clubs' personal dance rooms and that no personal dances shall be performed on the main show floor or in any area not designated as a personal dance area.

5. An entertainer shall have the right, during any shift, to decide that she no longer desires to perform on the stage rotation. In such event, the rent for the shift shall increase by $50.00 for each hour that the entertainer desires not to perform on the rotation.

6. The Entertainer and the Club agree that the minimum dance fee charged by the Entertainer shall be: $40.00 in either personal dance room. The parties agree that there shall be no maximum dance fee that the Entertainer may charge. Notwithstanding the forgoing, the Entertainer agrees that the she will participate in periodic promotional activities, which may include performing on a Sunday night and/or participating in daily Club promotions whereby the Entertainer will agree to reduce the minimum dance fees charged by her to her customer; however, in no event shall the minimum dance fees be reduced more than 50%.

7. The Entertainer agrees that should she be on the premises at any time when she is not scheduled to perform and she remains on the premise for more the 20 minutes, she shall be deemed to be on shift and subject to all terms of the lease, including the payment of rent. Notwithstanding the forgoing, this provision shall not apply when the Entertainer is on the premise for a legitimate business reason and the club is advised of the legitimate business reason at the time of her arrival at the club.

8. The Entertainer agree that for the protection of the guests, patrons, and fellow entertainers, as well as for the protection of the Club facilities, the entertainer shall not use lotion, gels, or glitter during any performance which takes place on any fixed stage or carpeted area of the Club.

9. Any term of the lease not specifically modified by Exhibit A shall remain in full force and effect.

Entertainer:

Dated: 7/22/13

Club:

By:

Dated: 7/22/13

4819-2726-1192, v. 1

Revised: December, 2012

Initials:

RRC d/b/a THE MEN'S CLUB, RALEIGH, NC
EXHIBIT B TO LEASE AGREEMENT
(Amendments and Modifications)

The parties acknowledge and agree that the following terms are incorporated into the Lease Agreement:

1. Pursuant to paragraph 15 (B) of the lease agreement, the parties agree that the percentage rent for table dances performed on the main show floor shall be split between the Club and the Entertainer as follows:

   Table Dances: The Entertainer agrees to pay, as percentage rent, $5.00 per song for each Table Dance performed during her showtime. The Entertainer may pay the percentage rent after each song or wait until the end of her showtime and pay all percentage rent due at that time.

2. Any term of the lease not specifically modified by Exhibit B shall remain in full force and effect.

Entertainer:

Leslie Holden
Dated: 02/08/13

Almond

Club:

By: 2-8-13
Dated:

Page 1 of 1 Page

Initials: LH

Exhibit 4

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO. 5:14-cv-00348-F

LESLIE HOLDEN on Behalf of Herself and on Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	**DEFENDANT RALEIGH RESTAURANT CONCEPTS, INC.'S MOTION TO DISMISS AND/OR TO STAY AND TO COMPEL ARBITRATION AND MOTION TO DISMISS ALL CLASS AND COLLECTIVE ACTION ALLEGATIONS**
v.	)	
RALEIGH RESTAURANT CONCEPTS, INC.,	)	
Defendant.	)	

Defendant Raleigh Restaurant Concepts, Inc. d/b/a the Men's Club ("RRC" or "Defendant"), through its undersigned counsel, and pursuant to Rule 12(b)(1) and/or Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby moves to dismiss, or alternatively stay, all claims on behalf of the Plaintiff Leslie Holden against Defendant, and moves to compel arbitration, in light of the arbitration provision contained in three separate agreements between the parties. These provisions unambiguously reflects the party's understanding and agreement that arbitration is the proper and exclusive forum for resolving their disputes. Thus, the Plaintiff Holden is contractually bound to arbitrate all issues raised in her Complaint in lieu of the instant court proceeding.

Defendant also moves to dismiss, with prejudice, the class and collective allegations from the Complaint as the party's agreement contains an unambiguous class and collective action waiver.

In bringing this Motion, Defendant relies upon the pleadings, applicable law, the contemporaneously filed Memorandum of Law in Support of its Motion to Compel Arbitration,

Motion to Dismiss and/or Stay All Claims, and Motion to Dismiss All Class and Collective Action Allegations, and such other and further materials as may be received and permitted by the Court.

WHEREFORE, Defendant RRC respectfully requests that this Court enter an order:

(1) Dismissing all claims filed by Plaintiff against Defendant, or alternatively staying this action with respect to this Plaintiff;

(2) Compelling arbitration of Plaintiff's claims on an individual basis based upon the parties' arbitration agreements;

(3) Dismissing the class and collective action allegations in their entirety, with prejudice because they are barred by the class and collective action waivers contained in the party's agreements; and

(4) Granting any further relief as this Court deems appropriate, including the cost and fees associated with the filing of this Motion.

Respectfully submitted this the 12th day of August, 2014.

JACKSON LEWIS P.C.

/s/Patricia Holland
PATRICIA HOLLAND
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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO. 5:14-cv-00348- F

LESLIE HOLDEN on Behalf of Herself and on Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	**CERTIFICATE OF SERVICE**
v.	)	
RALEIGH RESTAURANT CONCEPTS, INC.,	)	
Defendant.	)	

The undersigned certifies that on August 12, 2014, the foregoing *Motion to Dismiss and/or Stay and to Compel Arbitration and Motion to Dismiss All Class and Collective Action Allegations* was electronically filed with the Clerk of the Court, using the Court's CM/ECF system, which will send notification of such filing as follows:

Todd R. Ellis, Esq.
Law Office of Todd Ellis, P.A.
7825 Broad River Rd., Suite 100
Irmo, SC 29063
todd@toddellislaw.com

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Attorneys for Plaintiff

JACKSON LEWIS P.C.

BY: */s/ Patricia L. Holland*
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4829-9482-3196, v. 1

Exhibit 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:14-CV-348-F

LESLIE HOLDEN,
Plaintiff,

v.

RALEIGH RESTAURANT CONCEPTS, INC.
Defendant.

ORDER

This matter is before the court on Defendant's Motion to Dismiss and/or to Stay and to Compel Arbitration and Motion to Dismiss all Class and Collective Action Allegations [DE-7]. Plaintiff filed a response [DE-10], to which Defendant replied [DE-11]. Additionally, Plaintiff has filed a Motion for Leave fo File Sur-Reply [DE-12]. Defendant has filed a Response to Plaintiff's Motion for Leave [DE-15]. For reasons for fully stated below, the Defendant's Motion to Dismiss and/or to Stay and to Compel Arbitration and Motion to Dismiss all Class and Collective Action Allegations is ALLOWED in part and DENIED in part. Plaintiff's Motion for Leave to File Sur-Reply is DENIED.

I. STATEMENT OF THE CASE

Plaintiff Leslie Holden ("Holden") filed the instant collective and class action on June 13, 2014, alleging that Defendant Raleigh Restaurant Concepts, Inc. ("RRC") violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq., and the North Carolina Wage and Hour Act ("NCWHA"), N.C. Gen. Stat. §§ 95-25.1, et seq. Compl. [DE-1] ¶ 1.

RRC operates a gentlemen's club under the trade name "The Men's Club of Raleigh"

("Men's Club"), where Holden worked as an exotic dancer. Compl. ¶¶ 2-3. Holden and RRC executed an "Entertainment Lease" ("agreement") which states that the parties' business relationship is that of landlord and tenant, rather than employer and employee. Pl.'s Response in Opp., Ex. 1 [DE-10-1] ¶ 12. Holden claims that RRC misclassified her and the members of the putative class as independent contractors rather than employees, resulting in violations of statutory minimum wage and overtime requirements. Compl. ¶ 17.

The parties' agreement contains an arbitration clause which states that "any and all controversies between the entertainer and club . . . shall be exclusively decided by binding arbitration . . . ." Pl.'s Response in Opp., Ex. 1 [DE-10-1] ¶ 21. The agreement also purports to waive Holden's right to initiate or join a class or collective action against the Men's Club. *Id.* Based on these provisions of the agreement, RRC argues that "arbitration is the proper and exclusive forum for resolving [this] dispute[]." Def.'s Mot. to Dismiss [DE-7] at 1. RRC urges the court to dismiss or, alternatively, stay Holden's individual claims and compel arbitration, and to "dismiss, with prejudice, the class and collective allegations from the Complaint as the party's [sic] agreement contains an unambiguous class and collective action waiver." *Id.* Holden, in turn, contends that the arbitration clause is unenforceable and that the class and collective action waiver "is invalid under the law." Pl.'s Response in Opp. [DE-10] at 3, 15.

II. ANALYSIS

A. Holden's Motion to File a Sur-Reply

At the outset, the court considers Holden's Motion to File a Sur-Reply [DE-12]. She states that a sur-reply is necessary in order to further explain how the parties' "arbitration agreement operates to establish a contractual set-off" and to "provide additional commentary" on the Fourth

Circuit's unconscionability analysis. *Id.* at 2. RRC, in turn, argues that Holden's "Motion is improper and in violation of the Local Rules of this Court." Def.'s Resp. in Opp. [DE-15] at 1.

The Local Civil Rules for the Eastern District of North Carolina only allow for the filing of a motion, a response to a motion, and a reply. *See* Local Civil Rule 7.1; *Freeman v. City of Fayetteville*, 971 F. Supp. 971, 973 n.1 (E.D.N.C. 1997) ("The Local Rules of this court do not allow for the submission of sur-replies."). Accordingly, courts generally allow a party to file a sur-reply "only when fairness dictates based on new arguments raised in the previous reply." *DiPaulo v. Potter*, 733 F. Supp. 2d 666, 670 (M.D.N.C. 2010).

Holden does not seek to file a sur-reply in response to new arguments raised by RRC in its reply. Rather, she requests leave in order "to provide full briefing to the Court so that it can make an informed decision." Mot. to File Sur-Reply [DE-12] at 3. Holden may not file a sur-reply merely to supply the court with additional explanation and commentary. Therefore, her Motion to File a Sur-Reply is denied.

B. RRC's Motion to Compel Arbitration

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, reflects a liberal policy in favor of arbitration agreements. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Act requires a court to stay an action and compel arbitration "upon being satisfied that the issue involved . . . is referable to arbitration under [an agreement in writing]." *Id.* § 3. "A district court therefore has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (citing *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001)).

A party can compel arbitration by showing:

(1) the existence of a dispute between the parties;
(2) a written agreement that includes an arbitration provision which purports to cover the dispute;
(3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and
4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Whiteside v. Teltech Corp., 940 F.2d 99, 102 (4th Cir. 1991). The opposing party "may seek revocation of an arbitration agreement 'upon such grounds as exist at law or in equity for the revocation of any contract,' including 'generally applicable contract defenses, such as fraud, duress, or unconscionability . . . .'" *AT&T Mobility v. Concepcion*, ___ U.S. ___131 S. Ct. 1740, 1746 (2011) (internal citations omitted).

Holden does not contend that RRC has failed to establish any of the four elements for compelling arbitration outlined above. Rather, she argues that the arbitration provision is unenforceable because 1) its terms are unconscionable; 2) it seeks to strip her of substantive rights that the FLSA provides; and 3) RRC has breached its covenant of good faith. Pl.'s Response in Opp. [DE-10] at 3. Each of Holden's arguments is premised upon her contention that the arbitration agreement "prevents the Arbitrator from rendering a decision adverse to Defendant." *Id.* at 8. Holden's arguments are unpersuasive for several reasons.

First, Holden's assertion that the agreement prevents the arbitrator from finding in her favor is false. A central dispute in this case is whether "entertainment fees" that patrons paid to dancers are properly characterized as "service fees" — which would be property of the club — or "tips" — which would be property of the dancers. *Id.* Paragraphs 12 and 19 of the agreement contain provisions which state that if a judge or arbitrator determines that the parties' business relationship

is that of employer-employee, then "all entertainment fees would, both contractually and as a matter of law, be the property of the Club and would not be the property of the Entertainer." Decl. of Brett Amack, Ex. C [DE-8-2] ¶¶ 12, 19. However, in arbitration, Holden will have the opportunity to argue that these provisions are unlawful under the FLSA, as it is within the province of the arbitrator to make such a finding. *See Preston v. Ferrer*, 552 U.S. 346, 353 (2008) ("[A]ttacks on the validity of [a] contract . . . are within the arbitrator's ken.").

Further, the arbitration agreement itself states that the arbitrator "shall be permitted to award, subject only to the restrictions contained in [the arbitration provision], any relief available in a court." Decl. of Brett Amack, Ex. C [DE-8-2] ¶ 21. Holden argues that the arbitration provision limits what relief the arbitrator can award her by incorporating paragraphs 12 and 19 of the agreement. Pl.'s Response in Opp. [DE-10] at 6-8. Although the arbitration provision states that the rules of the American Arbitration Association will govern "*except as expressly or implicitly modified by [the parties'] agreement*," the court does not read this language as incorporating other potentially unlawful provisions of the contract into the arbitration agreement, thereby binding the hands of the arbitrator. *Id.* (emphasis added). Consequently, the premise upon which Holden bases her arguments is faulty.

Second, Holden does not challenge the arbitration provision itself. The Supreme Court has stated that "a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010). "A party challenging the enforceability of an arbitration clause . . . must rely on grounds that 'relate specifically to the arbitration clause and not just to the contract as a whole.'" *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 183 (4th Cir. 2013) (internal citations

omitted). In the case at hand, Holden argues that the arbitration provision is unenforceable by pointing to other provisions of the contract. Namely, she challenges the validity of paragraphs 12B, 12C, and 19 of the agreement which relate to "entertainment fees" and whether such fees are the rightful property of the entertainers or the Men's Club. Pl.'s Response in Opp. [DE-10] at 6-8. Holden's challenges to these contract provisions, which are separate from the arbitration provision, must be submitted to an arbitrator.[1] *See Jeske v. Brooks*, 875 F.2d 71, 75 (4th Cir. 1989) ("Because the alleged defects pertain to the entire contract, rather than specifically to the arbitration clause, they are properly left to the arbitrator for resolution.").

Lastly, with regard to Holden's unconscionability argument, she has failed to allege that the arbitration agreement is both procedurally and substantively unconscionable. *See Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 102, 655 S.E.2d 362, 370 (2008) ("A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability."). Substantive unconscionability refers to one-sided contract terms, while procedural unconscionability "involves 'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Id.* (internal citations omitted). Holden has presented no evidence of "bargaining naughtiness." In fact, as RRC notes, Holden on three different occasions signed contracts that contained this arbitration provision, the last of which occurred after this suit was filed when she was represented by counsel. Reply [DE-11] at 3. Moreover, the arbitration provision is prominently displayed in bold and capitalized font, suggesting that Holden was not subject to unfair surprise. Decl. of Brett Amack, Ex. C [DE-8-2] ¶ 21. Thus, Holden's unconscionability argument

[1]As indicated above, the court does not read the arbitration clause to incorporate the separate contract clauses at issue in such a way that would prohibit the arbitrator from finding the terms of those clauses to be unlawful.

is unavailing.

Based on the above analysis, the court will compel arbitration. However, the Fourth Circuit has not conclusively decided whether a stay or dismissal for lack of subject matter jurisdiction is proper when a dispute is subject to arbitration. *See Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012); *Bayer CropScience AG v. Dow AgroSciences LLC*, No. 2:12CV47, 2012 WL 2878495, at *7-8 (E.D. Va. July 13, 2012) (outlining conflicting Fourth Circuit precedent on the issue). While recognizing the disparate approaches the Fourth Circuit has taken on this issue, the court finds that RRC has failed to demonstrate why the arbitration clause, which is a contractual arrangement between the parties, divests this court of subject matter jurisdiction. *See DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 76 (1st Cir. 2000) ("Agreements to arbitrate are now typically viewed as contractual arrangements for resolving disputes rather than as an appropriation of a court's jurisdiction."). Thus, pursuant to § 3 of the FAA, the court will stay this matter pending arbitration.

C. RRC's Motion to Dismiss the Class and Collective Action Claims

RRC urges the court to dismiss Holden's class and collective action allegations based on the class and collective action waivers that are included in the parties' arbitration agreement. Mem. in Support of Mot. to Dismiss [DE-8] at 2. Holden responds that the waivers are unlawful, and points to Sixth Circuit precedent in support of her argument. Pl.'s Response in Opp. [DE-10] at 15.

Whether a party may pursue a class or collective action is a question for the arbitrator. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (plurality opinion). This issue "concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Id.* at 452. "Rather [it concerns] what kind of arbitration proceeding the

parties agreed to." *Id.* at 453. Answering this question involves "contract interpretation and arbitration procedures [which] [a]rbitrators are well suited to answer . . . ." *Id.* The Fourth Circuit appears to be in step with this reasoning, having stated that "the issue of whether [a] collective action waiver is unconscionable must be decided in arbitration." *Davis v. ECPI Coll. of Tech., L.C.*, 227 F.App'x 250, 251 (4th Cir. 2007) (unpublished).

The court concludes that the issue of whether Holden may properly bring class or collective action claims should be determined by the arbitrator. Accordingly, RRC's Motion to Dismiss the Class and Collective Action Claims is denied without prejudice.

III. CONCLUSION

Based on the foregoing, RRC's Motion to Dismiss and/or to Stay and to Compel Arbitration and Motion to Dismiss all Class and Collective Action Allegations [DE-7] is ALLOWED in part and DENIED in part. To the extent the Motion seeks to compel arbitration, the Motion is ALLOWED and this proceeding will be STAYED pending arbitration. The parties are DIRECTED to submit a status report of the arbitration proceedings no later than 90 days from the filing date of this order, and every 90 days thereafter, until such proceedings are concluded. To the extent the Motion seeks to dismiss all class and collective action allegations, the Motion is DENIED without prejudice. Additionally, Holden's Motion for Leave fo File Sur-Reply [DE-12] is DENIED.

SO ORDERED.

This the 10 day of November, 2014.

James C. Fox
James C. Fox
Senior United States District Judge

Exhibit 9

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 11

RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH

Case no. 10-CA-145882

RESPONDENT'S PETITION TO REVOKE, IN PART, SUBPOENA *DUCES TECUM* NUMBER: B-1-MBDR2V

Raleigh Restaurant Concepts, Inc. d/b/a/ The Men's Club of Raleigh ("Company" or "Respondent") pursuant to Section 102.31 (b) of the National Labor Relations Board Rules and Regulations, hereby petitions to revoke, in part, Subpoena *Duces Tecum* No. B-1-MBDR2V for the reasons set forth below.

INTRODUCTION

On April 30, 2015, Respondent was served with a Subpoena *Duces Tecum* No. B-1-MBDR2V (the "Subpoena"), attached hereto as Exhibit A. In the above-referenced Case ("Case") Charging Party's allegations are as follows:

> Since on or about August 2014 and continuing to the present, [Respondent] has maintained policies including a Mandatory Arbitration provision and Class and Collective Action Waiver. Since on or about August 12, 2014, the above-referenced [Respondent] has sought to enforce a waiver of the right (1) to mediate/arbitrate employment/FLSA disputes on a collective basis; and (2) to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b), against Leslie Holden, in violation of the NLRB decisions D.R. Horton, 357 NLRB No. 184 (January 2012), and Murphy Oil USA, Inc., 361 NLRB No. 72 (October 2014). The [Respondent] has sought to enforce a waiver of Ms. Holden s NLRA right to pursue collectively pursue litigation in all forums judicial and arbitral.

Charge Case 10-CA-145882. The Subpoena contains three paragraphs requesting documents and /or other information. Based on the nature of the Charge, the facts relevant to the Charge, and applicable law, rules, and regulations, the Company hereby submits this Petition to Revoke the Subpoena.

GENERAL OBJECTIONS

1.

The Company offers general objections to producing any of the requested documents which are not relevant to the allegations raised in the Amended Charge. Documents sought by Subpoena *Duces Tecum* in an NLRB investigation must be relevant to an issue raised in the Charge. See NLRB Rules and Regulations, § 102.31(b); Dow Chemical Co. v. Allen, 672 F.2d 1262, 1268 (7th Cir. 1982) ("relevancy of an adjudicative subpoena is measured against the charges specified in the complaint") [citations omitted]; Federal Trade Commission v. Anderson, 631 F.2d 741, 746 (D.C. Cir. 1979). The party requesting the documents has the burden of establishing their relevancy. See National Labor Relations Board v. Pinkerton's, Inc., 621 F.2d 1322 (6th Cir. 1980); Pinkerton's Inc., 233 NLRB No. 39 (1977). To satisfy this burden, the requesting party must provide evidence supporting its claim of relevancy. If the requesting party fails to establish the relevancy of the information, the subpoena must be revoked. NLRB Rules and Regulations, § 102.31(b).

In addition, Section 102.31(b) of the Board's Rules and Regulations provides, in relevant part, that upon a petition to revoke, "[the] Administrative Law Judge or the Board, as the case may be, shall revoke the subpoena, if, in his opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the

subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid."

The Company offers general objections to producing any of the requested documents to the extent that the Region invoked its subpoena power for the improper purpose of "initiating or expanding charges or investigations." Allied Waste Services of Massachusetts, LLC and Max Alexander, Case 01-CA-123082. The Board has limited power to investigate a Charge. Id. ("Section 11(1) of the Act limits the Board's subpoena power to a particular 'matter under investigation or in question.'"). The Board cannot initiate its own unfair labor practice proceeding, Id. The Board cannot expand an ongoing unfair labor practice proceeding, Id. (The Board does not have "carte blanch to expand the charge as [it] might please, or to ignore it all together.") [citation omitted]. Congress intentionally limited the Board's investigatory powers, Id. Where the Board invokes its subpoena power to expand an ongoing investigation it does so for an "improper purpose." Id. ("[I]f the record revealed that the Region invoked our subpoena power to obtain employee handbooks or policy statements for the purpose of initiating or expanding charges or investigations, this would be an 'improper purpose' that would warrant the revocation of the subpoena.") [emphasis added].

2.

The Company offers general objections to producing any of the requested documents to the extent the Region seeks such documents for the purpose of investigating whether the enforcement of class action waivers are unlawful under Section 7 of the Act. The Supreme Court, as well as the Second, Fifth, Eighth, Ninth, and Eleventh Circuits have explicitly or implicitly rejected the Board's position that class action waivers violate the Act. See

American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013); CompuCredit v. Greenwood, 132 S. Ct. 665, 669 (2012); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014)) cert denied 134 S. Ct. 2886 (June 30, 2014); Richards v. Ernst & Young, LLP, 744 F. 3d 1072, 1075, n.3 (9th Cir. 2013)), cert. denied 135 S. Ct. 355 (2014); D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013) pet. for rehearing en banc denied (5th Cir. No. 12-60031, Apr. 16, 2014); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. Mo. 2013); Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980). In the absence of an express congressional command, the validity of a class action waiver is determined under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

SPECIFIC OBJECTIONS

1.

The entertainment leases referenced in Request No. 1 of the Subpoena are identical except for the named individuals who signed the lease. The Company will produce documents responsive to Request No. 2 a) of the Subpoena.

2.

The Company will produce documents responsive to Request No. 2 a) of the Subpoena.

3.

The Company objects to Request No. 2 b), which seeks a list of names for all individuals who signed the lease, the date each individuals lease was executed and the duration period of each lease, because such request seeks information that is not relevant to any issue raised in the Amended Charge. Neither the name of all individuals who signed the entertainment lease, the date on which such individuals executed the lease, nor the duration of that

entertainment lease is relevant to the determination of whether entertainers are employees or independent contractors. Similarly, neither the name of the individuals who signed the entertainment lease, the date on which such individuals executed the lease, nor the duration of that entertainment lease is relevant to the determination of whether the enforcement of a class action waiver contained within an entertainment lease violates Section 7 of the Act. The Company further objects to Request No. 2 b) to the extent that the Region seeks information for the purpose of investigating whether the enforcement of class action waivers are unlawful under Section 7 of the Act. The Company has already provided the entire entertainment lease which Charging Party and other entertainers sign, which includes the arbitration provision and class action waiver in full. Finally, some entertainers work for only a day, and for short periods of time. Thus, requiring the Company to provide a list of all entertainers over the applicable time period is overly burdensome.

4.

The Company objects to Request No. 3 to the extent that it seeks employee handbooks because such request seeks documents that are not relevant to any issue raised in the Amended Charge. The Company did not provide entertainers with a copy of the employee handbook. Entertainers are not employees. Employee handbooks that were never provided to entertainers are not relevant to the issue of whether entertainers are employees or independent contractors. Similarly, employee handbooks that were never provided to entertainers are not relevant to the issue of whether the enforcement of a class action waiver within an entertainment lease violates Section 7 of the Act. The Company further objects to Request No. 3 because it seeks documents for the improper purpose of expanding or initiating an investigation. The Company further objects to Request No. 3 to the extent that the Region seeks information for the

purpose of investigating whether the enforcement of class action waivers are unlawful under Section 7 of the Act. The Company further objects to Request No. 3 on the grounds that it does not describe with sufficient particularity the evidence of which is required. The Company has already provided the entire entertainment lease which Charging Party and other entertainers sign, which includes the arbitration provision, the litigation waiver and class action waiver in full.

For the forgoing reasons, the Company requests that Subpoena No. B-1-MBDR2V be revoked, in part, as requested herein.

Respectfully submitted,

JACKSON LEWIS, P.C.

By: EMC / JRC

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2015, I caused the foregoing **RESPONDENT'S PETITION TO REVOKE, IN PART, SUBPOENA *DUCES TECUM* NUMBER: B-1-MBDR2V** to be filed with the Regional Director, National Labor Relations Board, Subregion 11, via electronic case filing at www.nlrb.gov.

I also certify that I caused a copy to be served via electronic mail and U.S. mail, postage-prepaid, upon the following:

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Exhibit 11

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LESLIE'S POOLMART, INC. Petitioner v. NATIONAL LABOR RELATIONS BOARD Respondent	No. 15-60627

UNOPPOSED MOTION TO HOLD CASE IN ABEYANCE

To the Honorable, the Judges of the United States
Court of Appeals for the Fifth Circuit:

The National Labor Relations Board ("the Board") moves the Court to hold this case in abeyance pending the Court's decisions in *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, and *Chesapeake Energy Corp. v. NLRB*, No. 15-60326. The Board's Decision and Order under review here, *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, 2015 WL 5027605 (Aug. 25, 2015), presents identical issues to those before the Court in *Murphy Oil* and *Chesapeake Energy*. For the purposes of judicial economy, the Board requests that the Court hold this case in abeyance until those cases have been decided. The Board has also filed simultaneous motions for abeyance in *The Neiman Marcus Group LLC*, 5th Cir. Case No. 15-60572;

PJ Cheese, Inc., 5th Cir. Case No. 15-60610; and *On Assignment Staffing Services, Inc.*, 5th Cir. Case No. 15-60642.

1. On August 25, 2015, the Board issued a Decision and Order finding that Leslie's Poolmart, Inc., violated Section 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, 158(a)(1), by maintaining and enforcing an arbitration agreement, as a condition of employment, that waives employees' right to pursue class or collective actions in employment-related claims in all forums, whether arbitral or judicial.

2. In support of its findings, the Board cited to and applied its decisions in *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *appeal pending*, 5th Cir. Case No. 14-60800 (oral argument held Aug. 31, 2015).

3. In *D.R. Horton, Inc. v. NLRB*, a divided panel of this Court rejected the Board's findings that the maintenance and enforcement of a mandatory arbitration agreement violated Section 8(a)(1) of the Act to the extent the agreement barred concerted pursuit of work-related legal claims in any forum, and denied enforcement of that violation. But it agreed with the Board that employees would reasonably interpret the agreement as prohibiting Board charges, and

enforced the Board's finding that, in that respect, the agreement violated the Act. 737 F.3d at 362-64.

4. In *Murphy Oil*, 2014 WL 5465454, the Board reaffirmed its decision and reasoning in *D.R. Horton*. The Board subsequently asked this Court to hear en banc Murphy Oil's petition for review and the Board's cross-application for enforcement in order to reconsider the panel decision in *D.R. Horton*. The Court denied the Board's request. *See* Order Denying Motion for Hearing En Banc, ECF No. 7878747-2 (June 24, 2015). Thereafter, *Murphy Oil* was fully briefed and, on August 31, was argued and submitted to a panel of this Court (Circuit Judges Jones, Smith, and Southwick).

5. On May 5, 2015, Chesapeake Energy Corporation petitioned this Court to review a Board Order issued against it, also finding that a mandatory arbitration agreement requiring employees to arbitrate work-related claims individually violated the Act pursuant to *D.R. Horton* and *Murphy Oil*. The Board filed a motion to place *Chesapeake Energy* in abeyance pending the Court's decision in *Murphy Oil*, because the cases raised the same central issue. *Chesapeake Energy*, No. 15-60326, ECF No. 7914507-2 (May 14, 2015). Chesapeake Energy opposed the Board's motion, and the Court denied it on June 12 and set the case for briefing. ECF No. 7914507-3. Chesapeake Energy's brief has been filed, and the Board's brief is due on September 30.

6. During the August 31 oral argument in *Murphy Oil*, Judge Jones expressed concern about the number of related cases presenting the same issue that were coming before the Court and asked to know the Board's position, specifically mentioning the pending *Chesapeake Energy* case as well as *Neiman Marcus*, discussed below. Both cases arose in other circuits and were brought to this Court on the employers' petitions for review. Board counsel explained that the National Labor Relations Act affords aggrieved parties a broad liberty of venue, allowing "[a]ny person aggrieved by a final order of the Board . . . [to] obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business . . . ." 29 U.S.C. § 160(f). Board counsel also pointed out that the Board had attempted to address the issue of judicial economy in *Chesapeake Energy* but that its motion to hold that case in abeyance pending decision in *Murphy Oil* had been denied.

7. In response to the judicial economy concerns expressed during the oral argument in *Murphy Oil*, the Board renews its prior suggestion that pending related cases, like the present one, be placed in abeyance. The Court presently has before it two cases addressing the merits of the principal issue disputed in this case. One, *Murphy Oil*, has been argued and the other, *Chesapeake Energy*, has been briefed by the employer and the Board's brief is due shortly. The Board submits

that it would best serve the interest of judicial efficiency, and conserve party resources, to place this case and others raising the identical issue in abeyance pending the Court's decisions in *Murphy Oil* and *Chesapeake Energy*.

8. The need for such a practical adjustment has only increased since the issue was raised at oral argument in *Murphy Oil*. In recent weeks, three other companies have filed petitions seeking review of Board decisions finding that their arbitration agreements violate the Act pursuant to *D.R. Horton* and *Murphy Oil*. On August 14, 2015, a petition was filed seeking review of the Board's Decision and Order in *The Neiman Marcus Group LLC*, 362 NLRB No. 157, 2015 WL 4647966 (Aug. 4, 2015), 5th Cir. Case No. 15-60572. *Neiman Marcus* originated from unfair-labor practice charges filed in California. The day of oral argument in *Murphy Oil*, a petition was filed seeking review of *PJ Cheese, Inc.*, 362 NLRB No. 177, 2015 WL 5001023 (Aug. 20, 2015), 5th Cir. Case No. 15-60610, *petition for review filed* Aug. 31, 2015. *PJ Cheese* originated from unfair-labor-practice charges filed in Alabama. And one week later, a petition was filed seeking review of *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), 5th Cir. Case No. 15-60642, *petition for review filed* September 17, 2015. *On Assignment* also originated from unfair-labor practice charges filed in California. Concurrent with the filing of this motion requesting that *Leslie's*

Poolmart be placed in abeyance, the Board is filing similar motions to hold these additional cases in abeyance.

9. Jeffrey A. Schwartz, counsel for Leslie's Poolmart, does not oppose this motion.

WHEREFORE, the Board respectfully requests that the Court hold this case in abeyance pending decisions in *Murphy Oil* and *Chesapeake Energy*.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben
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Dated at Washington, DC
this 23rd day of September, 2015

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LESLIE'S POOLMART, INC. Petitioner v. NATIONAL LABOR RELATIONS BOARD Respondent	No. 15-60627

CERTIFICATE OF SERVICE

I certify that on September 23, 2015, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO. 5:15-CV-00438-D

NATIONAL LABOR RELATIONS BOARD Applicant, vs. RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH, Respondent.	)	**RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR ORDER ENFORCING SUBPOENA *DUCES TECUM***

Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh ("Respondent" or the "Company"), respectfully submits Respondent's Supplemental Brief in Opposition to Application for Order Enforcing Subpoena *Duces Tecum* in response to the National Labor Relations Board's ("Board" or "NLRB") Application for Order Enforcing Subpoena *Duces Tecum* ("Application"). [DE # 1]. Respondent submits the instant Supplemental Brief in response to the Court's December 21, 2015, Order requesting that the parties address the effect of Murphy Oil USA, Inc. v. NLRB, No. 14-60800 (5th Cir. Oct. 26, 2015).

Although defenses to an underlying administrative charge generally are not to be litigated in a subpoena enforcement action, a court may deny enforcement of an administrative agency's subpoena by deciding a purely legal question. See FTC v. Shaffner, 626 F.2d 32, 36 (7th Cir. 1980). The Court should do so here. The United States Court of Appeals for the Fifth Circuit's decision in Murphy Oil USA, Inc. unequivocally denied enforcement of the National Labor Relations Board's ("Board") decision, reported at 361 NLRB No. 72 (2014), which decision found that class/collective action waivers violate the National Labor Relations Act ("Act" or

"NLRA"). As such, the Board's subpoena enforcement action is predicated on an action that is not viable which has similarly been discredited by courts within the confines of the United States Court of Appeals for the Fourth Circuit. See e.g. Green v. Zachry Industrial, Inc., 36 F. Supp. 3d 669, 674-675 (W.D. Va. 2014); Knight v. Rent-A-Center, 13-cv-1734, 2013 U.S. Dist. LEXIS 179774, at *5-6 (D.S.C. Dec. 23, 2013). As a result, granting enforcement of the Board's subpoena would be an unjust waste of time and resources. For the reasons discussed below, this Court should not countenance such a disrespect for the judicial branch.

I. The Fifth Circuit's Decision in Murphy Oil Reaffirmed That Court's Decision in D.R. Horton, Inc. v. NLRB

The Fifth Circuit's October 26, 2015 decision in Murphy Oil USA, Inc. did not rehash the substantive reasons for granting the respondent's petition for review. Instead, the Fifth Circuit held:

> [o]ur decision in [D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 348 (5th Cir. 2013)] was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.

In D.R. Horton, the court ruled that the right to participate in a class or collective action is not a substantive right, but rather, is a "procedural device." Id. at 357. This Court also held that the Board could not rely on the FAA's "saving clause" to justify its invalidation of arbitration agreements. On this point, the court explained that "[r]equiring the availability of class actions 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. (Internal citations omitted). The court also determined that the Board's prohibition of class action waivers disfavors arbitration, as it ruled that "[w]hile the Board's interpretation is facially neutral—requiring only that employees have access to collective

procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration." Id. at 360.

Next, the court concluded that the NLRA does not contain a congressional command to override the FAA. Relying on Supreme Court precedent, the court stated: "When considering whether a contrary congressional command is present, courts must remember 'that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" Id. at 360 (internal citations omitted). The court explicitly ruled that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." Id. Moreover, the court found that neither the legislative history of the NLRA, nor any policy consideration, would permit the NLRA to override the FAA. Id. at 361.

As a result, the court granted D.R. Horton's petition for review in all respects pertinent here.

Notably, two cases decided by courts within the confines of the Fourth Circuit have followed the Fifth Circuit's decision in D.R. Horton, (and thus, by extension, that court's decision in Murphy Oil as well as the Supreme Court precedent discussed infra) and rejected plaintiffs' efforts to resist the enforcement of class/collective action arbitration waivers. See e.g. Green, 36 F. Supp. 3d at 674-675 (court is "[p]ersuaded by the Fifth Circuit's reasoning in D.R. Horton, Inc. and the weight of available authority, the court finds that [the arbitration agreement]..., which contains an implied class waiver, does not violate the NLRA...."; Knight, 2013 U.S. Dist. LEXIS 179774, at *5-6 ("the NLRB's decision that served as the basis for Plaintiffs' attempts to avoid arbitration and enforcement of the class-waiver provision has now been overruled").

The rationales of these cases suggest that, if presented with the issue, the United States Court of Appeals for the Fourth Circuit would follow D.R. Horton and Murphy Oil and refuse to enforce a Board order finding class/collective action waivers violate the NLRA. As a result, enforcing the Board's subpoena in this case would run contrary to the overwhelming body of appellate and trial court authority holding that the Board's position regarding the validity of class/collective action waivers is untenable.

II. This Court Should Adjudicate Pure Questions of Law In A Subpoena Enforcement Action

Respondent acknowledges that "[t]he scope of judicial review over administrative subpoenas is necessarily limited by the intent of such review process." See EEOC v. American & Efird Mills, 964 F.2d 300, 303 (4th Cir. 1992). Thus, "[t]he process is not one for a determination of the underlying claim on its merits; Congress has delegated that function to the discretion of the administrative agency." Id. Instead, "courts should look only to the jurisdiction of the agency to conduct such an investigation." Id.

There is, however, an exception to this rule. In Shaffner, 626 F.2d, at 32, discussed supra, the Federal Trade Commission sought enforcement of a subpoena duces tecum for an attorney's records. The attorney resisted on the grounds that a governing statute exempted him from coverage. The United States Court of Appeals for the Seventh Circuit held that "a party can challenge the authority of an agency to issue a particular subpoena where … the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations…." Id. at 36.

Relying on Shaffner, in EEOC v. Ocean City Police Dep't, 820 F.2d 1378, 1382 (4th Cir. 1987), vacated on other grounds 486 U.S. 1019 (1988), the United States Court of Appeals for

the Fourth Circuit denied enforcement of an EEOC subpoena in connection with an admittedly untimely charge of discrimination. The court held:

> Our case can be determined without reference to any further factual development. It presents a distilled and purely legal question of statutory construction: Does a charge which is admittedly untimely filed with the EEOC nevertheless give the EEOC the right to issue subpoenas to investigate the merits of the charge? Our case also does not require the parties to engage in time consuming discovery nor require the district court to construct a lengthy record. None of the administrative efficiency considerations favoring deferred review should apply here, and nothing will be gained by deferring judicial review of the issue.

Id.[1]

In the present case, no further factual development is necessary. Instead, a purely legal question is apparent: May the Board conduct discovery of a meritless theory of violation? Here, as determined by D.R. Horton and Murphy Oil, the Federal Arbitration Act, not the NLRA, governs the validity of mandatory arbitration policies containing class or collective action waivers. The Board's position that such agreements violate the NLRA is contrary to Supreme Court precedent and has been either expressly or implicitly rejected by every Circuit Court which has considered it. See American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013); CompuCredit v. Greenwood, 132 S. Ct. 665 (2012); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014); Richards v. Ernst & Young, LLP, 744 F. 3d 1072, 1075, n.3 (9th Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013); Sutherland v. Ernst & Young, 726 F.3d 290 (2d Cir. 2013). Thus, this Court should not permit the Board to continue this fishing expedition given that is predicated on an erroneous interpretation of the law.

[1] Respondent acknowledges that the Supreme Court's decision to vacate the Fourth Circuit's decision in Ocean City may render the precedential effect of that decision in limbo. See EEOC v. City of Norfolk Police Dep't., 45 F.3d 80, 83, n. 4 (4th Cir. 1995). However, the Supreme Court's decision to vacate Ocean City had nothing to do with the ruling that is pertinent here.

III. Enforcing The Subpoena Will Perpetuate The Board's Non-Acquiescence To Higher Authorities

Since the Fifth Circuit issued its decision in Murphy Oil USA, Inc. in late October 2015, the Board has issued approximately 20 decisions holding class/collective action arbitration waivers unlawful. Several employers adversely affected by these decisions have filed petitions for review in the Fifth Circuit. Incredulously, the Board continues to issue decisions flying in the face of the Fifth Circuit's decisions in D.R. Horton and Murphy Oil while simultaneously requesting that the Fifth Circuit hold the petitions for review in abeyance until the court acts upon a yet to be filed petition for rehearing *en banc* in Murphy Oil.[2] Accordingly, the Board has demonstrated a clear pattern of non-acquiescence to the Fifth Circuit. Thus, if this Court chooses to ignore the forceful effect of D.R Horton and Murphy Oil, it will only serve to validate the Board's inappropriate disregard of the Fifth Circuit's decision.

Given the decisions in Green and Knight, which were both rendered by courts within the Fourth Circuit, there is nothing to suggest that the Fourth Circuit would reach a different conclusion than the Fifth Circuit on this particular issue. Thus, this Court can short-circuit the Board's shameless waste of resources in seeking to effectuate non-violations of the National Labor Relations Act. Accordingly, for the reasons set forth in its initial opposition papers and herein, Respondent respectfully requests that this Court deny the Board's Application for an Order Seeking to Enforce the Subpoena *Duces Tecum*.

---

[2] The Board has stated its intent to file an *en banc* petition. However, to date, it has not done so. To date, the Board has filed successful motions with the Fifth Circuit to hold the following cases in abeyance pending the outcome of the *en banc* proceedings: American Express Travel Related Servs. Co., Case No. 15-60830, The Neiman Marcus Group, Case No. 15-60572, PJ Cheese, Inc., Case No. 15-60610, Leslie's Poolmart, Inc., Case No. 15-60627, On Assignment Staffing Servs., Inc., Case No. 15-60642, Citigroup Technology, Case No. 15-60856.

Respectfully submitted this the 8th day of January, 2016.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION No. 5:15-cv-00438-D

NATIONAL LABOR RELATIONS BOARD,

Applicant,

vs.

RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that on January 8, 2016, the foregoing *Respondent's Supplemental Brief in Opposition to Application for Order Enforcing Subpoena Duces Tecum* was electronically filed with the Clerk of the Court, using the Court's CM/ECF system, which will send notification of such filing as follows:

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4839-9263-5692, v. 1

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO. 5:15-CV-00438-D

NATIONAL LABOR RELATIONS BOARD, Applicant, vs. RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH, Respondent.	)	**RESPONDENT'S RESPONSE TO SUPPLEMENTAL MEMORANDUM OF NEW CASE LAW IN SUPPORT OF APPLICATION FOR ORDER ENFORCING SUBPOENA *DUCES TECUM***

Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh ("Respondent" or the "Company"), respectfully submits Respondent's Response to the National Labor Relations Board's ("Board" or "NLRB") Supplemental Memorandum of New Case Law in Support of Application for Order Enforcing Subpoena *Duces Tecum* ("Supplemental Memorandum") [DE # 21]. The Board's Supplemental Memorandum encourages this Court to follow a clear minority (and incorrect) view that class/collective action waivers violate the National Labor Relations Act and are thus unenforceable as a matter of law. Notably, as discussed below, the Board's Supplemental Memorandum completely ignores a more recent decision issued by the United States Court of Appeals for the Eighth Circuit, *to which the Board was a party*, which is in concert with the overwhelming majority of appellate courts which have concluded that class/collective action waivers are enforceable and do not violate the National Labor Relations Act.

For the foregoing reasons, as well as those set forth in Respondent's earlier memoranda, the Board's Application should be denied in its entirety. At the very least, this Court should stay

any determination with respect to the Board's Application until, as discussed below, the United States Supreme Court's opportunity to address the issue at the heart of this matter has elapsed.

I. THE SEVENTH CIRCUIT'S DECISION IN *LEWIS V. EPIC SYSTEMS CORP.* REPRESENTS A MINORITY VIEW ON THE ENFORCEABILITY OF CLASS/COLLECTIVE ACTION WAIVERS.

The Board's Supplemental Memorandum brought to this Court's attention the United States Court of Appeals for the Seventh Circuit's decision in Lewis v. Epic Systems Corp., No. 15-2997 (7th Cir. May 26, 2016). The Seventh Circuit has taken the clear *minority* view that class/collective action waivers violate the National Labor Relations Act. By contrast, the Second, Fifth, Eighth, Ninth, and Eleventh Circuits, which collectively represent the *majority* view on this issue, have all explicitly or implicitly *rejected* the Board's position that such waivers are unenforceable because they violate the National Labor Relations Act. See Sutherland v. Ernst & Young, 726 F.3d 290 (2d Cir. 2013), Murphy Oil USA v. NLRB, 808 F.3d 1013 (5th Cir. 2015) (en banc review denied May 13, 2016); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013); Cellular Sales of Missouri, LLC v. NLRB, 15-1620 (8th Cir. June 2, 2016)(attached hereto as Exhibit "A"); Richards v. Ernst & Young, LLP, 744 F. 3d 1072, 1075, n.3 (9th Cir. 2013); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014).[1]

As a result, because this Court is under no obligation to follow the minority view on this issue, it should deny the Application.

[1] Further, as Respondent has previously noted, two courts within this Circuit have held that the Board's position in this regard is untenable. See e.g. Green v. Zachry Industrial, Inc., 36 F. Supp. 3d 669, 674-675 (W.D. Va. 2014); Knight v. Rent-A-Center, 13-cv-1734, 2013 U.S. Dist. LEXIS 179774, at *5-6 (D.S.C. Dec. 23, 2013).

II. THE BOARD IGNORES THE EIGHTH CIRCUIT'S DECISION IN *CELLULAR SALES OF MISSOURI V. NLRB* WHICH FOLLOWS THE FIFTH CIRCUIT'S DECISION IN *MURPHY OIL* AND WAS ISSUED BEFORE THE BOARD'S SUPPLEMENTAL MEMORANDUM WAS FILED

On June 10, 2016, the Board filed its Supplemental Memorandum. Notably, the Board conveniently omitted the Eighth Circuit's *June 2, 2016* decision in Cellular Sales of Missouri which explicitly followed that court's earlier decision in Owen as well as the Fifth Circuit's decision in Murphy Oil, discussed supra. Notably, unlike in Lewis, the Board was a *party* in Cellular Sales of Missouri thereby rendering the omission of any reference to the Eighth Circuit's decision in its June 10, 2016 Supplemental Memorandum to be disingenuous.

As a result, Respondent urges this Court to follow the Eighth Circuit's decision, as well as the other courts referenced above, which have held that class/collective action waivers are enforceable and do not violate the National Labor Relations Act.

III. ADJUDICATION OF THE BOARD'S APPLICATION SHOULD BE HELD IN ABEYANCE PENDING THE OUTCOME OF POTENTIAL SUPREME COURT REVIEW IN *MURPHY OIL*

In light of the split in authority between the Seventh and other Circuits regarding the enforceability of class/collective action waivers, the Board has filed several motions with the Fifth Circuit seeking to hold pending cases in abeyance involving the same issue as the instant case until the latter of: (1) the expiration of the Board's deadline to petition for certiorari in Murphy Oil has expired; or (2) conclusive action by the Supreme Court in connection with a petition the Board may file. One such motion, filed by the Board on June 10, 2016 in Neiman Marcus Group, LLC v. NLRB, 16-60572, is attached hereto as Exhibit "B."

In concert with the Board's public stance in this regard, Respondent submits that holding the instant case in abeyance pending the certiorari deadline and/or Supreme Court action in Murphy Oil will preserve scarce judicial resources because it is possible that a Supreme

Court decision will conclusively determine whether class/collective action waivers are enforceable as a matter of law throughout the United States. However, if ultimately the Board declines to file a petition in Murphy Oil or the Supreme Court declines to review the Fifth Circuit's decision in Murphy Oil, Respondent urges this Court to follow those Circuits and courts within the Fourth Circuit referenced supra and deny the Board's Application in its entirety.

Respectfully submitted this the 20th day of June, 2016.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION No. 5:15-cv-00438-D

NATIONAL LABOR RELATIONS BOARD, Applicant, vs. RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH, Respondent.	)	**CERTIFICATE OF SERVICE**

The undersigned certifies that on June 20, 2016, the foregoing Respondent's Response to the National Labor Relations Board's Supplemental Memorandum of New Case Law in Support of Application for Order Enforcing Subpoena *Duces Tecum* was electronically filed with the Clerk of the Court, using the Court's CM/ECF system, which will send notification of such filing as follows:

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4846-3837-4962, v. 1

United States Court of Appeals
For the Eighth Circuit

No. 15-1620

Cellular Sales of Missouri, LLC

Petitioner

v.

National Labor Relations Board

Respondent

Labor Law Scholars

Amicus on Behalf of Respondent

No. 15-1860

Cellular Sales of Missouri, LLC

Respondent

v.

National Labor Relations Board

Petitioner

Labor Law Scholars

Amicus on Behalf of Petitioner

National Labor Relations Board

Submitted: January 13, 2016
Filed: June 2, 2016

Before WOLLMAN, MELLOY, and COLLOTON, Circuit Judges.

WOLLMAN, Circuit Judge.

The National Labor Relations Board (Board) found that Cellular Sales of Missouri, LLC (Cellular Sales) had violated sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157, 158(a)(1), by maintaining and enforcing a mandatory arbitration agreement under which employees waived their rights to pursue class or collective action to redress employment-related disputes in any forum. The Board also found that employees of Cellular Sales would reasonably understand the arbitration agreement to waive or impede their rights to file unfair labor practice charges with the Board. Cellular Sales petitions for review, arguing that the Board's order should not be enforced, and the Board cross-applies for enforcement. We enforce the order in part and decline to enforce the order in part.

John Bauer, formerly an independent contractor for Cellular Sales, was hired by the company as an employee in January 2012. As a condition of his employment, Bauer entered into an employment agreement that included a provision under which he agreed to arbitrate individually "[a]ll claims, disputes, or controversies" related to

his employment and to waive any class or collective proceeding (arbitration agreement). The arbitration agreement provided in relevant part:

> All claims, disputes, or controversies arising out of, or in relation to this document or Employee's employment with Company shall be decided by arbitration . . . . Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding. . . . The decision of the arbitrator shall be final, binding, and enforceable in any court of competent jurisdiction and the parties agree that there shall be no appeal from the arbitrator's decision. . . . Except for the exchange of documents that the parties intend to use to support their claims and defend against the other parties' claims, there shall be no interrogatories, depositions or other discovery in any arbitration hereunder.

Bauer's employment with Cellular Sales ended in late May 2012. Approximately five months later he filed a putative class-action lawsuit against the company in federal court, alleging violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. Cellular Sales moved to dismiss the lawsuit and compel arbitration. The district court[1] granted the motion, concluding that the arbitration agreement—including the class-action waiver—was enforceable. Bauer then commenced an arbitration proceeding against Cellular Sales. The parties eventually settled, and the district court granted their joint motion to approve the settlement and to dismiss Bauer's lawsuit with prejudice.

While his lawsuit was pending, Bauer filed an unfair labor practice charge with the Board, claiming that Cellular Sales violated his right to engage in protected concerted activity in violation of sections 7 and 8(a)(1) of the NLRA when it required him to sign an arbitration agreement that included a class-action waiver. The Board

[1]The Honorable Beth Phillips, United States District Judge for the Western District of Missouri.

issued a complaint, and an administrative law judge (ALJ) ruled in favor of the Board, concluding that Cellular Sales's arbitration agreement violated the NLRA because of its individual arbitration requirement and because employees would reasonably interpret the arbitration agreement as barring or restricting their rights to file unfair labor practice charges with the Board. The ALJ also concluded that Cellular Sales had violated the NLRA by moving to dismiss Bauer's putative class-action lawsuit and compel enforcement of the arbitration agreement.

The Board affirmed and adopted the ALJ's rulings and findings. The Board ordered Cellular Sales to either rescind the arbitration agreement or revise it to clarify that, by signing the agreement, employees do not waive their rights to pursue employment-related class or collective actions in all forums and are not restricted in their rights to file charges with the Board. It also ordered Cellular Sales to notify all of its current and former employees of these changes; to notify the district court that these changes were made and that the company no longer opposed Bauer's lawsuit (even though the lawsuit had been dismissed over a year earlier); and to reimburse Bauer for legal fees and expenses incurred in opposing Cellular Sales's motion to dismiss and compel arbitration (even though Cellular Sales had prevailed on its motion, Bauer had not appealed, and the parties had ultimately settled). This petition for review and cross-application for enforcement followed.

We review the Board's findings of fact for substantial evidence on the record as a whole, that is, for such relevant evidence as "'a reasonable mind might accept as adequate to support' a finding." NLRB v. Am. Firestop Sols., Inc., 673 F.3d 766, 767-68 (8th Cir. 2012) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)). We review the Board's conclusions of law *de novo*. Id. at 768. We will defer to the Board's interpretation of the NLRA "so long as it is rational and consistent with that law," id. (citations omitted), but we need not defer to the Board's interpretation of other federal statutes, see, e.g., Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 (8th Cir. 2013); see also Hoffman Plastic Compounds, Inc. v. NLRB, 535

U.S. 137, 144 (2002) ("[W]e have . . . never deferred to the Board's . . . preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.").

Cellular Sales first argues that the Board erred in finding that because the class-action waiver restricted employees' substantive rights under section 7 to engage in protected concerted activity, the arbitration agreement violated section 8(a)(1) of the NLRA. Cellular Sales notes that in reaching this conclusion, the Board relied on two of its prior decisions, D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012), and Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454 (Oct. 28, 2014), each of which concluded that arbitration agreements imposing similar class-action waivers violated section 8(a)(1). Cellular Sales points out that the Board's reasoning in those decisions was directly rejected by the Fifth Circuit. See D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013) (denying enforcement in relevant part, rejecting Board's position that use of class-action procedure was a "substantive right" under section 7 of the NLRA, and concluding that "[b]ecause the Board's interpretation does not fall within the [Federal Arbitration Act's (FAA)] 'saving clause,' and because the NLRA does not contain a congressional command exempting the statute from application of the FAA," the arbitration agreement, including the class-action waiver, "must be enforced according to its terms"); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015) (denying enforcement in relevant part and concluding that the employer "committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue"). Cellular Sales also points to our court's decision rejecting the Board's reasoning—albeit in a case that was not on review from a Board decision. Owen v. Brisol Care, Inc., 702 F.3d 1050, 1053-55 (8th Cir. 2013) (rejecting the Board's position in D.R. Horton and joining "fellow circuits that have held that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA").

The Board acknowledges that its position has twice been rejected by the Fifth Circuit, and it concedes that our holding in Owen is fatal to its argument "that a mandatory agreement requiring individual arbitration of work-related claims" violates the NLRA. Consequently, in addition to filing its brief in this matter, the Board filed a motion for initial hearing *en banc* and requested that we reconsider our holding in Owen. The Board's motion was denied, and thus, in accordance with Owen, we conclude that Cellular Sales did not violate section 8(a)(1) by requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes. Accordingly, we grant the petition for review and decline to enforce the Board's order with respect to this issue. See Owen, 702 F.3d at 1053-55; see also D.R. Horton, 737 F.3d at 362; Murphy Oil, 808 F.3d at 1018.

Cellular Sales next argues that the Board erred when it found that the company violated section 8(a)(1) by seeking to enforce the arbitration agreement through a motion to dismiss and compel arbitration in Bauer's putative class-action lawsuit. The Board determined that "an employer's enforcement of an unlawful rule . . . independently violates [s]ection 8(a)(1)" and concluded that Cellular Sales's motion to dismiss and compel arbitration sought to enforce an unlawful contract and thereby interfere with or restrain employees from exercising their rights under the NLRA. The Board specifically noted that in finding this separate violation of the NLRA, it was "rely[ing] solely on the principle that the enforcement of an unlawful provision is, in itself, an independent violation of [section] 8(a)(1)." As a remedy for this violation, the Board ordered Cellular Sales to reimburse Bauer "for all reasonable expenses and legal fees, with interest, incurred in opposing [Cellular Sales's] unlawful motion to compel individual arbitration." It also ordered Cellular Sales to notify the district court "that it no longer oppose[d Bauer's class-action lawsuit] on the basis of the arbitration agreement."

Because the class-action waiver did not violate section 8(a)(1), Cellular Sales's attempt to enforce the class-action waiver likewise did not violate section 8(a)(1). Accordingly, we grant the petition for review and decline to enforce the Board's order with respect to this issue. We also decline to enforce the Board's remedies related to this issue. See Murphy Oil, 808 F.3d at 1021 (declining to enforce Board's award of legal fees and expenses in similar circumstances).

Cellular Sales next argues that the Board erred when it found that the company violated section 8(a)(1) because its employees would reasonably construe the arbitration agreement to bar or restrict their rights to file charges with the Board or seek access to the Board's processes. The NLRA prohibits an employer from entering into an agreement with employees that circumscribes the Board's authority to prevent unfair labor practices. See 29 U.S.C. § 160(a). Thus, an arbitration agreement violates section 8(a)(1) if it expressly prohibits employees from filing unfair labor practice charges with the Board or if it would be reasonably construed by employees to restrict or preclude such activity. See D.R. Horton, 737 F.3d at 363 ("Even in the absence of express language prohibiting section 7 activity, a company nonetheless violates section 8(a)(1) if employees would reasonably construe the language to prohibit section 7 activity." (quoting Cintas Corp. v. NLRB, 482 F.3d 463, 467 (D.C. Cir. 2007) (internal quotation marks omitted)).

As set forth above, Cellular Sales's arbitration agreement included a broad requirement that "[a]ll claims, disputes, or controversies arising out of, or in relation to" employment with the company "shall be decided by arbitration." Given "the absence of any limits to this broadly worded provision," the Board concluded that the arbitration agreement violated section 8(a)(1) "because employees would reasonably believe [the agreement] waived or limited their rights to file Board charges or to access the Board's processes."

Cellular Sales contends that the specific language of the arbitration agreement, read as a whole and in context, could not be reasonably construed by employees to preclude or restrict their rights to file charges with the Board. It argues that because the arbitration agreement does not expressly prohibit employees from filing charges with the Board and makes no reference to agency or administrative proceedings, employees could not read the agreement as having any bearing on their rights to file charges with the Board. It also contends that because the agreement states that an arbitration decision is "final, binding and enforceable in any court of competent jurisdiction," and refers to interrogatories, depositions, and other discovery-related matters that do not generally apply in Board proceedings, the "implication" is that the arbitration agreement prohibits only court proceedings.[2] We are not persuaded.

The Board has held that an arbitration agreement violates section 8(a)(1) when it provides that the agreement does not constitute a waiver of an employee's obligation to file a timely charge with the Board. In Bill's Electric, Inc., 350 N.L.R.B. 292, 296 (2007), the agreement provided that arbitration was the exclusive method of dispute resolution, but also stated that it "shall not be a waiver of any requirement for the Employee to timely file any charge with the NLRB, EEOC, or any State Agency . . . as may be required by law to present and preserve any claimed statutory violation in a timely manner." This provision was not sufficient to alert employees that they retained rights to file charges with the Board because, "[a]t the very least, the mandatory . . . arbitration policy would reasonably be read by . . . employees as substantially restricting, if not totally prohibiting, their access to the Board's

[2]Cellular Sales contends that the fact that Bauer actually filed an unfair labor practice charge with the Board establishes that the arbitration agreement cannot be reasonably construed by employees as limiting or precluding that activity. But the "'actual practice of employees is not determinative' of whether an employer has committed an unfair labor practice." Murphy Oil, 808 F.3d at 1019 (citation omitted). Instead, the question is whether the employer's action is "likely to have a chilling effect" on its employees' exercise of their rights under the NLRA. D.R. Horton, 737 F.3d at 357.

processes." Id.; see also D.R. Horton, 737 F.3d at 364 (noting that references to "court," "judge," and "jury" in mandatory arbitration agreement were "insufficient to counter the breadth of the waiver created by the phrase 'right to file a lawsuit or other civil proceeding'"). The Board has also found a violation of section 8(a)(1) when an agreement required arbitration of "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" because, although the language did not explicitly restrict proceedings before the Board, "the breadth of the policy language" would result in employees reasonably interpreting the agreement to prohibit those proceedings. U-Haul Co. of Cal., 347 N.L.R.B. 375, 377-78 (2006), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007) (mem.). Similarly, the Board affirmed an ALJ's finding of a section 8(a)(1) violation when an arbitration agreement stated that "all disputes" and "legal claims" were required to be arbitrated, Board charges were not included in a list of exceptions, and the agreement provided that "such claims shall not be filed or pursued in court." Utility Vault Co., 345 N.L.R.B. 79, 81 (2005). And in Murphy Oil, the Fifth Circuit enforced the Board's finding that an arbitration agreement requiring employees to arbitrate "any and all disputes or claims" related in any manner to employment and to waive class or collective action "in any other forum" could "create '[t]he reasonable impression . . . that an employee [was] waiving not just [her] trial rights, but [her] administrative rights as well.'" 808 F.3d at 1019 (quoting D.R. Horton, 737 F.3d at 363-64).

Although the language used by Cellular Sales in its arbitration agreement is not identical to the language used in Bill's Electric, U-Haul, Utility Vault, or Murphy Oil, it is similar in both its breadth and its generality, and thus we find those cases instructive. Moreover, the Board's construction of the NLRA is "entitled to considerable deference, and must be upheld if it is reasonable and consistent with the policies of the [NLRA]." St. John's Mercy Health Sys. v. NLRB, 436 F.3d 843, 846 (8th Cir. 2006) (citations omitted). The Board's finding that Cellular Sales violated section 8(a)(1) because its employees would reasonably interpret the arbitration agreement to limit or preclude their rights to file unfair labor practice charges with the

Board is reasonable and is consistent with the NLRA. Accordingly, we deny the petition for review and enforce the Board's order with respect to this issue, including corrective action with respect to any employees who remain subject to the arbitration agreement. See Murphy Oil, 808 F.3d at 1019.

Finally, Cellular Sales argues that the Board's order is unenforceable in its entirety because Bauer's unfair labor practices charge was untimely under section 10(b) of the NLRA, 29 U.S.C. § 160(b), and because Bauer was no longer an "employee" under section 2(3) of the NLRA, id. § 152(3), when the charge was filed. Again, we disagree.

Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). Cellular Sales argues that Bauer entered into the arbitration agreement "on or about January 1, 2012," but did not file his unfair labor practice charge until December 2012, well after the six-month limitation period under section 10(b) had expired. The Board rejected Cellular Sales's argument that the charge was time-barred, noting that the parties had stipulated that "[s]ince about January 1, 2012, [Cellular Sales] has promulgated, maintained, and enforced" the arbitration agreement—a stipulation that included the relevant six-month period preceding the unfair labor practice charge Bauer filed on December 11, 2012. The Board found a violation because, it noted, "the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated." We agree.

The violation found here is not related exclusively to the circumstances that existed when Bauer signed the arbitration agreement in January 2012. Rather, at issue is the legality of Cellular Sales's continued maintenance of the agreement. The Board has repeatedly held that an employer commits a continuing violation of the NLRA throughout the period during which an unlawful agreement is maintained. See, e.g., Gamestop Corp., 363 N.L.R.B. No. 89, 2015 WL 9592400, at *1 (Dec. 31, 2015)

(rejecting argument that complaint was time-barred by section 10(b) where employer continued to maintain the unlawful agreement during the six-month period preceding the charge, and noting that maintenance of an unlawful workplace rule constitutes a continuing violation that is not time-barred by section 10(b)); The Pep Boys, 363 N.L.R.B. No. 65, 2015 WL 9460022 (Dec. 23, 2015) (same); Register-Guard, 351 N.L.R.B. 1110, 1110 n.2 (2007) (noting that "[t]he maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of [section] 8(a)(1)"), *enforced in part*, 571 F.3d 53 (D.C. Cir. 2009). We have determined that employees would reasonably interpret the arbitration agreement to bar or interfere with their rights to file unfair labor practice charges with the Board. Cellular Sales stipulated to the fact that it maintained the arbitration agreement during the relevant period. Having been filed during the period in which Cellular Sales maintained the unlawful arbitration agreement, Bauer's unfair labor practice charge was thus not time-barred. See, e.g., Gamestop, 363 N.L.R.B. No. 89, 2015 WL 9592400, at *1.

Cellular Sales also argues that Bauer was not an "employee" within the meaning of section 2(3) of the NLRA because he was not employed by the company during the six-month period preceding his unfair labor practice charge. Section 2(3) provides that "[t]he term 'employee' shall include any employee," a definition the Board has interpreted in the "broad generic sense" to "include members of the working class generally." Briggs Mfg. Co., 75 N.L.R.B. 569, 571 (1947) ("This broad definition covers, in addition to employees of a particular employer, also employees of another employer, or former employees of a particular employer, or even applicants for employment."). The Board has long held that a former employee continues to be an "employee" within the meaning of the NLRA. See Little Rock Crate & Basket Co., 227 N.L.R.B. 1406, 1406 (1977) (noting that "employee" under section 2(3) of the NLRA means "members of the working class generally" and includes "former employees of a particular employer"); see also Haynes Bldg. Servs. LLC, 363 N.L.R.B. No. 125, 2016 WL 737040 (Feb. 23, 2016) (noting that "a discharged employee remains a statutory employee entitled to the full protection of the

[NLRA]"). Given the NLRA's broad definition of "employee" and the considerable deference we owe to the Board's reasonable construction of the NLRA, we conclude that the Board did not err in finding that Bauer was an "employee" under the NLRA. See Allied Chem. & Alkali Workers, Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971) (noting that "the task of determining the contours of the term 'employee' has been assigned primarily" to the Board). In sum, because Cellular Sales's unlawful arbitration agreement remained in effect and governed Bauer both as a current and as a former employee during the section 10(b) limitations period, his unfair labor practice charge was not time-barred.

The petition for review is granted in part and denied in part, and the Board's order is denied in part and enforced in part.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEIMAN MARCUS GROUP, LLC	)	
Petitioner	)	
v.	)	No. 15-60572
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

UNOPPOSED MOTION TO HOLD CASE IN ABEYANCE

To the Honorable, the Judges of the United States
Court of Appeals for the Fifth Circuit:

The National Labor Relations Board ("the Board") moves the Court to hold this case in abeyance until the time for petitioning the Supreme Court for a writ of certiorari in *Murphy Oil USA, Inc. v. NLRB*, 5th Cir. Case No. 14-60800, has passed, and, in the event that such a petition is filed, until the Supreme Court resolves the case. The Board states the following in support:

1. On August 4, 2015, the Board issued a Decision and Order finding that Neiman Marcus Group, LLC ("the Company"), violated Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, 158(a)(1), by maintaining and/or enforcing a mandatory arbitration policy that requires

employees, as a condition of employment, to waive their right to pursue class or collective actions involving employment-related actions in all forums, whether arbitral or judicial. 362 NLRB No. 157, 2015 WL 4647966.

2. In support of its findings, the Board cited to, and applied its decisions in, *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), *enforcement denied in part,* 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied,* 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016). In both cases, this Court rejected the Board's findings that the maintenance of a mandatory arbitration agreement violated Section 8(a)(1) of the NLRA to the extent the agreement barred concerted pursuit of work-related legal claims in any forum, and denied enforcement of that violation.

3. The Company filed a petition for review of the Board's Order on August 14, 2015. On October 2, the Court granted the Board's motion to hold the case in abeyance pending resolution of *Murphy Oil* and *Chesapeake Energy Corp. v. NLRB*, 633 F. App'x 613 (5th Cir. 2016), another case in which the Board applied *D.R. Horton* and *Murphy Oil*. On May 23, 2016, after the Court had issued decisions in both of those cases, and after mandate issued in *Murphy Oil*, the Court reactivated the case and set July 5, 2016, as the due date for the opening brief. In a

subsequent letter dated May 25, the Court explained that the case was reactivated because the decisions and mandates had issued in *Murphy Oil* and *Chesapeake*,[1] and the Board's motion "did not request to hold the case in abeyance pending certiorari."

4. The Board requests that the Court place the case back into abeyance until the time for petitioning for certiorari in *Murphy Oil* has passed and, in the event that such a petition is filed, until the Supreme Court resolves the case. As the Board explained in its initial motion, the Board Decision and Order under review here presents identical issues to those in *Murphy Oil*. Accordingly, the interest of judicial economy will be served by holding this case in abeyance until the time for petitioning for certiorari has passed and, if a petition is filed, the Supreme Court resolves the matter.

5. This Court has previously placed numerous similar cases in abeyance pending the outcome of *Murphy Oil*. *See, e.g., Brinker Int'l Payroll Co., L.P.*, Case No. 15-60859 (held in abeyance "until petition for rehearing en banc is resolved and time for petitioning the Supreme Court for a writ of certiorari has passed" in *Murphy Oil*); *Prof'l Janitorial Serv. of Houston, Inc.*, Case No. 15-60858 (placing into abeyance "pending the final resolution of" *Murphy Oil*); *Am.*

[1] Neither judgment nor mandate has issued in *Chesapeake*. The Board filed its proposed judgment on February 26, 2016, which Chesapeake opposed on March 14.

Express Travel Related Servs. Co., Case No. 15-60830 (same). In other cases, however, the Court has denied the Board's motion for a stay. *See Securitas Security Serv. USA, Inc. v. NLRB*, Case No. 16-60304 (May 26, 2016); *RGIS, LLC v. NLRB*, Case No. 16-60129 (Mar. 28, 2016); *Employers Resource v. NLRB*, Case No. 16-60034 (Feb. 22, 2016); *Citi Trends, Inc. v. NLRB*, Case No. 15-60913 (Feb. 16, 2016). In addition, since issuing mandate in *Murphy Oil*, the Court has issued letters in several stayed cases explaining that the case will remain in abeyance until the time for petitioning for certiorari has passed.[2] In other cases, the Court has lifted the stay. *See On Assignment Staffing Servs. Inc. v. NLRB*, Case No. 15-60642 (May 24, 2016). The Court has also granted a motion to lift a stay. *PJ Cheese, Inc. v. NLRB*, Case No. 15-60610 (April 19, 2016).

6. The need for an abeyance is particularly warranted given that the Board has continued issuing orders presenting identical issues to those in *Murphy*

[2] More specifically, on May 23, after issuing mandate in *Murphy Oil*, the Court issued Letters of Advisement in approximately 10 cases, informing the parties that it had reactivated the cases. *See, e.g., Citigroup Technology, Inc. v. NLRB*, Case No. 15-60856 (May 23, 2016); *Kmart Corp. v. NLRB*, Case No. 15-60897 (May 23, 2016) (same); *Domino's Pizza, LLC v. NLRB*, Case No. 15-60914 (May 23, 2016) (same). The next day, the Court issued a Memorandum in many of those cases placing the case back into abeyance until the time for petitioning the Supreme Court has passed. Although the parties received those memoranda by ecf notification, they do not appear on PACER. We have attached as Exhibit A the Memoranda received by the Board in *Citigroup*, which is nearly identical to the memoranda received in those cases. *See Citigroup Technology, Inc. v. NLRB*, Case No. 15-60856 (May 24, 2016).

Oil, many of which parties may petition this Court to review under the NLRA's broad venue provision. *See Murphy Oil*, 2015 WL 6457613, at *1, 4.

7. Counsel for the Company does not oppose the Board's motion.

WHEREFORE, the Board respectfully requests that the Court hold this case in abeyance until the time for petitioning for certiorari in *Murphy Oil* has passed and, in the event that such a petition is filed, until the Supreme Court resolves the case.

Respectfully submitted,

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Dated at Washington, DC
this 10th day of June, 2016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEIMAN MARCUS GROUP, LLC	)	
Petitioner	)	
v.	)	No. 15-60572
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that on June 10, 2016, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

/s/ Linda Dreeben
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Dated at Washington, DC
this 10th day of June, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:15-CV-438-D

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. RALEIGH RESTAURANT CONCEPTS, INC., Respondent.	)	**ORDER**

On August 31, 2015, the National Labor Relations Board ("NLRB") petitioned this court to enforce a subpoena duces tecum it had served on Raleigh Restaurant Concepts, Inc. ("Raleigh Restaurant Concepts") [D.E. 1] and filed a memorandum in support [D.E. 2]. On October 20, 2015, Raleigh Restaurant Concepts responded in opposition and argued that the NLRB's petition should be denied or, in the alternative, held in abeyance until the United States Court of Appeals for the Fifth Circuit resolved Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015). See [D.E. 12] 7–12. On October 26, 2015, the Fifth Circuit decided Murphy Oil. On December 21, 2015, this court ordered supplemental briefing concerning that case [D.E. 17]. On January 8, 2016, the parties filed their supplemental briefs [D.E. 18–20]. As explained below, the court grants the NLRB's application for an order enforcing the subpoena duces tecum.

I.

This case relates to a separate action before this court. On June 13, 2014, Leslie Holden ("Holden") filed a putative class or collective action against Raleigh Restaurant Concepts in the Eastern District of North Carolina. See Compl., Holden v. Raleigh Rest. Concepts Inc., No.

5:14-CV-348-F, [D.E. 1], (E.D.N.C. June 13, 2014). Holden, an exotic dancer, alleges that Raleigh Restaurant Concepts violated the Fair Labor Standards Act ("FLSA") and the North Carolina Wage and Hour Act by misclassifying her and others as "independent contractors" as opposed to "employees." Id. ¶¶ 10–107; cf. McFeeley v. Jackson St. Entm't, LLC, No. 15-1583, 2016 WL 3191896, at *2–6 (4th Cir. June 8, 2016) (holding that exotic dancers were employees of the clubs under the FLSA, rather than independent contractors). In Holden, the court ordered Holden to arbitrate her claims and held that the arbitrator must determine whether Holden may bring class or collective action claims. See Order, Holden v. Raleigh Rest. Concepts Inc., No. 5:14-CV-348-F, [D.E. 27] 1–2, 7 (E.D.N.C. Oct. 28, 2015); see also id. [D.E. 29] (E.D.N.C. June 30, 2016).

During the litigation, Holden filed a charge with the NLRB alleging that Raleigh Restaurant Concepts violated the National Labor Relations Act ("NLRA") by seeking enforcement of a contractual waiver of the right to collectively pursue her claims in all forums, judicial and arbitral. [D.E. 1-1]; see [D.E. 1-5] 31–32 (amending Holden's NLRB charge to include an allegation that Raleigh Restaurant Concepts sought to enforce the policies).[1] The NLRB is investigating Holden's charge.

As a part of its investigation, on March 13, 2015, the NLRB wrote Raleigh Restaurant Concepts and asked it to provide "entertainer leases . . . and copies of all handbooks and work rules that apply to employees at Respondent's facility." [D.E. 1] ¶ d. In response, Raleigh Restaurant Concepts provided the NLRB all documents that Holden had executed, but not leases signed by other entertainers or copies of rules or handbooks that apply to employees of Raleigh Restaurant Concepts. See [D.E. 12] 3. On April 30, 2015, after receiving Raleigh Restaurant Concept's "incomplete"

[1] Unless otherwise noted, docket entry citations refer to filings in this case.

response, the NLRB issued a subpoena duces tecum for the documents. [D.E. 1] ¶¶ e–g; see [D.E. 1-3].

On May 7, 2015, Raleigh Restaurant Concepts filed with the NLRB a written petition to revoke the subpoena. See [D.E. 1] ¶ h; [D.E. 1-5]. In its petition to revoke, Raleigh Restaurant Concepts argued that (1) employee handbooks and work rules were not relevant to the case because, as a contractor, Holden never saw these documents; (2) the NLRB could investigate only the charge that Holden filed, not investigate potential violations of the NLRA regarding any non-charging parties; and, (3) insofar as the NLRB was investigating a claim that enforcement of a class-action waiver violated the NLRA, the claim was meritless, and the NLRB could not investigate meritless claims. See [D.E. 1-5] 6–10. The NLRB's Counsel for General Counsel opposed the petition to revoke the subpoena and argued that (1) employee handbooks and work rules were relevant to investigating whether employees of Raleigh Restaurant Concepts had been unlawfully forced to waive their NLRA rights; (2) the request did not expand the scope of the charge; and, (3) no binding precedent indicated whether class-action waivers violate the NLRA. [D.E. 1-5] 19–21.

On July 20, 2015, the NLRB denied the petition to revoke the subpoena. [D.E. 1-6] 2. On August 17, 2015, Raleigh Restaurant Concepts confirmed that it would not provide the subpoenaed information. [D.E. 1] ¶ i. On August 31, 2015, the NLRB filed its petition in this court. See id.

II.

The NLRA gives employees certain statutory rights. See National Labor Relations Act, 29 U.S.C. §§ 151 et seq. The NLRA also empowers the NLRB to "prevent any person from engaging in any unfair labor practice" under the NLRA. Id. § 160(a); see id. § 158 (defining "unfair labor practice"); NLRB v. Interbake Foods, LLC, 637 F.3d 492, 497 (4th Cir. 2011). Specifically, the NLRA grants the NLRB the power to investigate alleged unfair labor practices, "conduct hearings,

. . . administer oaths, examine witnesses, and receive evidence." Interbake Foods, LLC, 637 F.3d at 497; see 29 U.S.C. §§ 160(b), 161(1). After a hearing, the NLRB may "issue cease and desist orders, orders reinstating employees, and orders requiring reports," all of which "are subject to judicial review and enforcement." Interbake Foods, LLC, 637 F.3d at 497 (citing 29 U.S.C. §§ 160(e)–(f)).

Additionally, the NLRB may subpoena witnesses to attend a hearing or produce evidence as part of a proceeding or investigation. See 29 U.S.C. § 161(1). After a party is served with a subpoena, it may, within five days, petition the NLRB to revoke the subpoena. Id. The NLRB "shall revoke" any subpoena requesting information that "does not relate to any matter under investigation, or any matter in question in [a] proceeding[], or if in its opinion such subp[o]ena does not describe with sufficient particularity the evidence whose production is required." Id. "Inherent in the [NLRB's] authority to issue subpoenas, to revoke subpoenas, to examine witnesses, and to receive evidence in accordance with the Federal Rules of Evidence is the authority to make substantive [evidentiary] rulings . . . ." Interbake Foods, LLC, 637 F.3d at 498.

If a party refuses to comply with an NLRB subpoena, the NLRB cannot enforce the subpoena by itself. Id.; see 29 U.S.C. § 161(2). Rather, the NLRB must apply to an Article III court for enforcement. See Interbake Foods, LLC, 637 F.3d at 498. "This reservation of authority to Article III courts protects against abuse of the [administrative] subpoena power." Id. Although judicial scrutiny is limited, courts must not blindly enforce administrative subpoenas. See id. at 499.

To discharge its duty, a district court must determine whether "the subpoena is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." Id. (quotation omitted); see United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); EEOC v. Randstad, 685 F.3d 433, 442 (4th Cir. 2012); cf. In re Subpoena Duces Tecum, 228 F.3d

341, 349 (4th Cir. 2000) (discussing Fourth Amendment requirements for administrative subpoenas). The party opposing the subpoena may raise "any appropriate defense," including an objection based upon overbreadth, lack of specificity, or infringement of a cognizable privilege. See Interbake Foods, LLC, 637 F.3d at 499. The district court has "authority to evaluate the parties' positions" and, before ordering compliance with the subpoena, "the district court must satisfy itself [that], under appropriate legal standards, it should enforce the subpoena." Id. at 499–500 (emphases in original).

A.

"To establish its authority to investigate, the [administrative agency] need only present an 'arguable' basis for jurisdiction." Randstad, 685 F.3d at 442. "At the subpoena-enforcement stage," the district court may not assess "the likelihood that the [agency] would be able to prove the claims made in the charge." Id. at 449 (quotation and citation omitted); see EEOC v. Shell Oil Co., 466 U.S. 54, 72 n.26 (1984). Rather, "[a]s long as jurisdiction is plausible and not plainly lacking, the subpoena should be enforced, unless the party being investigated demonstrates that the subpoena is unduly burdensome." Randstad, 685 F.3d at 442 (quotations and citation omitted).[2]

The NLRB claims jurisdiction to investigate a charge that Raleigh Restaurant Concepts

[2] Raleigh Restaurant Concepts argues that the "court should adjudicate pure questions of law in a subpoena enforcement action," citing nonbinding case law and a Fourth Circuit opinion that the Supreme Court vacated. [D.E. 18] 4–5; see EEOC v. Ocean City Police Dep't, 820 F.2d 1378, 1381–82 (4th Cir. 1987) (en banc), vacated on other grounds, 486 U.S. 1019 (1988); cf. Shell Oil Co., 466 U.S. at 65 (holding, in a case involving an EEOC subpoena, that the existence of a charge that meets statutory procedural "requirements . . . is a jurisdictional prerequisite to judicial enforcement" of the subpoena). As such, according to Raleigh Restaurant Concepts, if the facts alleged in the charge and reasonable inferences drawn therefrom do not, as a matter of law, plausibly violate the NLRA, the NLRB has no authority to investigate and therefore the subpoena should be quashed.

As logically tidy as this argument seems, the Fourth Circuit has not yet adopted it. See Randstad, 685 F.3d at 442. Thus, in accordance with Randstad, the court assesses only whether the NLRB "arguabl[y]" has jurisdiction. See id.

violated the NLRA by requiring Holden to waive her right to pursue a collective action as a part of an arbitration agreement. [D.E. 2] 2–6. The court may not speculate as to the likelihood that the NLRB will ultimately prove that the contractual waiver in this case violated Holden's NLRA rights. See Randstad, 685 F.3d at 449.[3] Rather, it must decide whether this determination "arguably" falls within the jurisdiction of the NLRB. See id. at 442.

The Fourth Circuit has not yet decided whether a mandatory class-action waiver in an arbitration agreement violates the NLRA. Federal circuit courts have reached conflicting conclusions. Compare Cellular Sales of Mo., LLC v. NLRB, No. 15-1620, No. 15-1860, 2016 WL 3093363, at *2 (8th Cir. June 2, 2016) (holding that a mandatory class-action waiver as part of an arbitration agreement does not violate the NLRA) and Murphy Oil, 808 F.3d at 1018–20 (same), with Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1154–55 (7th Cir. 2016) (holding that requiring an employee to relinquish class-action rights violates the NLRA). Given the absence of controlling precedent and the circuit split, the NLRB's jurisdiction is not plainly lacking, and the NLRB has authority to investigate the charge. See, e.g., Morton Salt Co., 338 U.S. at 652; Randstad, 685 F.3d at 442; Interbake Foods, LLC, 637 F.3d at 499.

B.

Next, the court must determine whether the subpoena demand is too indefinite. See Morton Salt Co., 338 U.S. at 652; Randstad, 685 F.3d at 442; Interbake Foods, LLC, 637 F.3d at 499. Here, the subpoena duces tecum requests that Raleigh Restaurant Concepts provide (1) "all leases signed

[3] Likewise, the court may not speculate whether Holder is an "employee" within the meaning of the NLRA. The interpretation of the term "employee" as used in the NLRA falls within the NLRB's jurisdiction. See, e.g., NLRB v. United Ins. Co. of Am., 390 U.S. 254, 260 (1968); ARA Leisure Servs., Inc. v. NLRB, 782 F.2d 456, 459 (4th Cir. 1986).

by" entertainers or a copy of the lease and a list of entertainers who signed it from July 1, 2014, through the date the subpoena was served and (2) "[d]ocuments . . . show[ing] all work rules, policies, or other conditions of employment" for Raleigh Restaurant Concept employees during the same time period. [D.E. 1-3] 3, 5. The subpoena reasonably describes the documents sought and is appropriately limited in scope and time. See, e.g., In re Subpoena Duces Tecum, 228 F.3d at 349; Luttrell v. Dep't of Def., No. 5:10-MC-19, 2010 WL 2465538, at *2 (E.D.N.C. June 11, 2010) (unpublished). Thus, the subpoena is not too indefinite. See Morton Salt Co., 338 U.S. at 652; Randstad, 685 F.3d at 442; Interbake Foods, LLC, 637 F.3d at 499.

C.

Finally, the court must determine whether the information sought is reasonably relevant to the charge. See Morton Salt Co., 338 U.S. at 652; Randstad, 685 F.3d at 442; Interbake Foods, LLC, 637 F.3d at 499. The amended charge alleges that Raleigh Restaurant Concepts engaged in an unfair labor practice by enforcing Holden's waiver of her right to pursue a class action or to arbitrate on a class basis against Raleigh Restaurant Concepts. [D.E. 1-5] 31. The amended charge also charges that Raleigh Restaurant Concepts engaged in an unfair labor practice by "maintain[ing] policies including a Mandatory Arbitration provision and Class and Collective Action Waiver." Id.

First, the NLRB seeks leases signed by entertainers other than Holden during the time period at issue or a copy of the entertainer lease and a list of names of those who signed it. [D.E. 1-3] 5. The identities of members of the putative victim class are reasonably relevant to the charge. See, e.g., In re Subpoena Duces Tecum, 228 F.3d at 350–51 (holding that medical records regarding numerous patients were reasonably related to government investigation of health care fraud by a doctor); see also, e.g., EEOC v. United Parcel Serv., Inc., 587 F.3d 136, 139–140 (2d Cir. 2009) (per curiam) (holding that the district court applied "too restrictive a standard of relevance" when it

denied enforcement of a subpoena seeking information regarding an employer's nationwide application of allegedly discriminatory policy); New Orleans S.S. Ass'n v. EEOC, 680 F.2d 23, 26 (5th Cir. 1982) (holding that a list containing the name, race, and sex of examinees was relevant in investigating an allegedly discriminatory test); cf. ACLU v. Clapper, 785 F.3d 787, 814 (2d Cir. 2015) (holding invalid a subpoena with "no foreseeable end point, no requirement of relevance to any particular set of facts, and no limitations as to subject matter or individuals covered").

Second, the subpoena seeks "[d]ocuments, including employee handbooks and company guidelines, . . . show[ing] all work rules, policies, or other conditions of employment" for employees at Raleigh Restaurant Concepts during the period covered by the subpoena. [D.E. 1-3] 5. Raleigh Restaurant Concepts argues that these documents are not reasonably relevant to any charged violation of Holden's NLRA rights because, as an independent contractor, Holden did not view, execute, or receive copies of these documents, nor was she required to follow them. See [D.E. 12] 9; [D.E. 1-5] 9–10. Holden charges, however, that Raleigh Restaurant Concepts "maintained policies" constituting the unfair labor practice at issue. [D.E. 1-5] 31. Insofar as the subpoenaed documents may contain evidence regarding company-wide enforcement of these policies—both as to individuals that Raleigh Restaurant Concepts considers employees and as to the entertainers, who the NLRB may ultimately classify as employees—the request reasonably relates to investigation of alleged NLRA violations. Accordingly, the demands of the NLRB subpoena are "within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant" to the charge. Thus, the court grants the petition to enforce the subpoena. See Morton Salt Co., 338 U.S. at 652; see also Randstad, 685 F.3d at 442; Interbake Foods, LLC, 637 F.3d at 499.

III.

In sum, the NLRB's petition for enforcement of subpoena [D.E. 1] is GRANTED.

SO ORDERED. This 11 day of August 2016.

JAMES C. DEVER III
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO. 5:15-CV-00438-D

NATIONAL LABOR RELATIONS BOARD, Applicant, vs. RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH, Respondent.	)	**NOTICE OF APPEAL**

Notice is hereby given that Raleigh Restaurant Concepts, Inc. d/b/a The Men's Club of Raleigh, Respondent in the above-named case, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order of the Court (DE # 23) granting Applicant's Application for Order Enforcing Subpoena Duces Tecum entered in this action on August 12, 2016.

Respectfully submitted this the 8th day of September, 2016.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO. 5:15-CV-00438-D

NATIONAL LABOR RELATIONS BOARD,

Applicant,

vs.

RALEIGH RESTAURANT CONCEPTS, INC. d/b/a THE MEN'S CLUB OF RALEIGH,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that on September 8, 2016, the following *Notice of Appeal* was electronically filed with the Clerk of the court, using the Court's CM/ECF system, which will send notification of the filing as follows:

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